The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands

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I. Introduction

The five island political communities in the Pacific and Caribbean that are part of the United States but are not states have always had a unique legal status under U.S. law. This status occasionally works for the benefit of the inhabitants of these islands, but it frequently creates hardships or awkward situations. This article examines the legal framework within which these communities operate and presents alternatives that can be pursued for the future.

The island groups that now fly the U.S. flag but are not states are the Territory of American Samoa, the Territory of Guam, the Commonwealth of the Northern Mariana Islands (CNMI), the Commonwealth of Puerto Rico, and the Territory of the U.S. Virgin Islands. Most of the island groups from the Trust Territory of the Pacific have chosen to become "free associated states," and their new political entities—the Federated States of Micronesia and the Republic of the Marshall Islands—are taking their places in the community of nations, while the Republic of Palau is still struggling to decide some key details of its future relationship with the United States. The United States also has a number of Pacific islands without permanent populations, including, at present, Baker, Howland, Kingman Reef, Jarvis, Johnston, Midway, Palmyra, and Wake Islands. These islands are sometimes referred to as "possessions" rather than "territories," although the distinction is not by any means precise. Because they have no permanent population, they are not self-governing and have no inhabitants seeking self-determination. The legal issues regarding their governance are, therefore, substantially different from those discussed in this article.

Puerto Rico's status is now once again undergoing reexamination, and its residents are again reviewing the options of statehood, independence, or an "enhanced" commonwealth status, which is discussed below. The four other populated U.S.-flag political communities—American Samoa, Guam, the Commonwealth of the Northern Marianas, and the U.S. Virgin Islands—may never become states because of their unique cultures, their small size, and their distance from the U.S. mainland, but they deserve greater stature than is provided by the concept of "territory" under U.S. law. They are each unique and they require individualized treatment by Congress and the federal agencies. They are entitled either to more autonomy than they now have or to more power to participate in decision making in Washington.

This article will examine the propositions (1) that the Constitution and U.S. laws have been interpreted and applied to these U.S. insular

political communities in a manner that is different from the way they have been interpreted and applied to the states of the United States, (2) that matters in these insular political communities should continue to be treated differently in the future and in particular that federal agencies can and should establish different regimes for these insular communities than those that govern the states, and (3) that these communities should have more autonomy under a newly-defined political relationship with the United States or should have some voting representation in the U.S. Congress.

II. The Status of "Territories" Under the U.S. Constitution

A. An Overview, with Preliminary Definitions

The first "territory" of the United States was the Northwest Territory, which was already being settled by immigrants from the original states at the time of the drafting of the United States Constitution in 1787. The status of this vast area was unsettled at the time, with Virginia claiming a substantial portion of it. Others argued that the land should be held by the federal government. Smaller states were concerned with the degree of representation in Congress that would be granted to the new states to be created in this area.[1]

In response to these different concerns, the framers adopted Article IV, Section 3 which provides the only language in the Constitution dealing with the question of territories. This "Territory Clause" provides that:

> The Congress shall have Power to dispose of and make all needful rules and regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.[2]

Subsequent judicial decisions have recognized broad Congressional power to administer territories. For example, an 1885 decision stated that Congress could pass legislation applicable to the territories "subject

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[1] Arnold H. Leibowitz, *The Applicability of Federal Law to Guam*, 16 Va. J. Int'l L. 21, 23 (1975) [hereinafter Leibowitz, *Guam*].

[2] U.S. Const. art. IV, § 3. The drafting history of this clause is described in Arnold H. Leibowitz, Defining Status 10-16 (1989) [hereinafter Leibowitz, Defining Status].

only to such restrictions as are expressed in the Constitution . . . ."[3] On the basis of this case and others discussed below, two principles have emerged: (1) the power of Congress comes not only from the Territory Clause, but also from other provisions of the Constitution, and (2) the Constitution imposes some restrictions on the power of Congress in relation to the civil rights of residents of the territories.[4]

1. "Unincorporated" and "incorporated" territories

The concepts of "unincorporated" and "incorporated" territories were introduced in the *Insular Cases*[5] decided by the United States Supreme Court in 1901. In these decisions, Justice Edward D. White formulated the view that if a government had the power to expand its territory by any means, then that power also included the right to establish and determine the status of the newly-acquired territory.[6] A newly-acquired territory does not, therefore, automatically become "incorporated" and does not achieve that status until Congress acts to "incorporate" it. In Justice White's view, the provisions of the Constitution are fully applicable to the residents of an incorporated territory, but not necessarily to those in an unincorporated territory. In the *Insular Cases*, the Court determined that Puerto Rico was an "unincorporated" territory, and, therefore, that the Uniformity Clause of the Constitution[7] was not applicable to Puerto Rico unless it was found to be a "fundamental" aspect of our constitutional system (which it was not).[8] Territories that have become formally "incorporated" are usually thought to be in a transition stage on their way to becoming a state,[9] although this linkage is not necessarily inevitable. All five of

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[3] Murphy v. Ramsey, 114 U.S. 15, 44 (1885).

[4] Leibowitz, *Guam*, supra note 1, at 26; *see infra* notes 138-41 and accompanying text.

[5] DeLima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901).

[6] Downes v. Bidwell, 182 U.S. 244, 287-344 (1901) (White, J., concurring); *see* Leibowitz, *Guam*, *supra* note 1, at 27.

[7] U.S. Const. art. I, § 8, cl. 1.

[8] *See* Leibowitz, *Guam*, *supra* note 1, at 28.

[9] *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 268-69 (1990) (citing Dorr v. United States, 195 U.S. 138, 149 (1904), quoted *infra* note 61). Alaska and Hawai'i were, for instance, formally incorporated into the United States before they became states.

the current U.S.-flag insular political communities—American Samoa, Guam, the Northern Marianas, Puerto Rico, and the U.S. Virgin Islands—are now considered by the federal government's executive branch to be "unincorporated" territories.[10]

2. "Organized" and "unorganized" territories

An "organized" territory is one that has established a civil government under an organic act passed by Congress.[11] The civil government need not adopt any particular structure.[12]

Utilizing these definitions, Guam is an "organized" territory because it is subject to the terms of the Guam Organic Act of 1950.[13] Guam remains "unincorporated" because Congress has not taken steps to incorporate it.[14] American Samoa is an "unorganized," "unincorporated" territory—it has a legislature (*fono*) and an elected governor, but the operation of the civil government is not the result of the enactment of an organic act.

3. "Commonwealth"

The term "commonwealth" has several different meanings when used in different contexts. The Commonwealth of Nations consists of

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[10] *See infra* note 14 and accompanying text. During hearings before the House Committee on Interior and Insular Affairs, the Resident Representative of the Commonwealth of the Northern Marianas (CNMI) stated that "[t]he United States apparently intended this result because the Covenant makes no provision whereby the Northern Mariana Islands would be considered for statehood." He further noted that "[t]he idea of 'unincorporated' status, however, is a negative definition in that it stresses what we are not, i.e., that the Northern Mariana islands is not an 'incorporated' territory with the right to be considered for statehood, rather than clarifying what our status is." *Hearing on Federal Policies Regarding the Insular Areas Before the House Comm. on Interior and Insular Affairs*, 99th Cong., 2d Sess. (Apr. 10, 1986).

[11] Laurent B. Frantz, *States, Territories, and Dependencies*, 72 AM. JUR. 2d § 131, 401, 518.

[12] Although a legislature has sometimes been thought to be a necessary element, there have been some instances where the existence of a legislature was held not to be essential to the concept of an organized territory. *See* Interstate Commerce Commission v. United States, 224 U.S. 474 (1912).

[13] 64 Stat. 384 (codified at 48 U.S.C. § 1421-28e (1988)).

[14] The Virgin Islands is also unincorporated. *See* Granville-Smith v. Granville-Smith, 349 U.S. 1, 6 (1955); United States v. Husband R. (Roach), 453 F.2d 1054, 1058 (5th Cir. 1971), *cert. denied*, 406 U.S. 935 (1972) (holding that the Panama Canal Zone is an unicorporated territory); Government of Virgin Islands v. Rijos, 285 F. Supp. 126, 129 (D.V.I. 1968).

independent sovereign nations formerly part of the British Empire. Kentucky, Massachusetts, Pennsylvania, and Virginia all refer to themselves as "Commonwealths" for historical reasons.

As used in connection with insular political communities affiliated with the United States, the concept of a "commonwealth" anticipates a substantial amount of self-government (over internal matters) and some degree of autonomy on the part of the entity so designated. The commonwealth derives its authority not only from the United States Congress, but also by the consent of the citizens of the entity. The commonwealth concept is a flexible one designed to allow both the entity and the United States to adjust the relationship as appropriate over time. Puerto Rico and the Northern Marianas now have "commonwealth" status,[15] and Guam is currently seeking this status.[16] The Philippines was a "commonwealth" before it became independent in 1946. The precise meaning of this concept as applied to these entities is uncertain, however, and it may have different meanings as applied to each entity.[17] To illustrate the uncertainty, the Spanish name for the "Commonwealth of Puerto Rico" is "El Estado Libre Asociado de Puerto Rico" which translates to "Free Associated State of Puerto Rico."

Puerto Rico was an unincorporated territory until the 1950-52 period when it became a commonwealth.[18] In 1950, Congress offered the Puerto Ricans a "compact" to enable them to organize a government pursuant to a constitution of their own adoption.[19] The voters of Puerto Rico approved their compact on June 4, 1951, and their constitution was ratified on March 3, 1952.[20] Although Puerto Rico can amend its constitution without congressional approval, any amendment must be consistent with the 1950-52 Compact and the U.S. Constitution.[21] After this renegotiation of Puerto Rico's status was completed, Judge Calvin Magruder of the United States Court of Appeals for the First Circuit wrote that Puerto Rico's commonwealth status was "unprecedented in

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[15] *See infra* notes 148 and 192-94 and accompanying text.

[16] *See infra* notes 227-35 and accompanying text.

[17] *See infra* notes 142-223 and accompanying text.

[18] *See infra* notes 142-48 and accompanying text.

[19] Pub. L. No. 600, 64 Stat. 319 (1950) (codified at 48 U.S.C. §§ 731b-e (1988)).

[20] *See* 48 U.S.C. § 731d note (1988).

[21] *See* H.R. CONF. REP. No. 2350, 82d Cong., 2d Sess., at 1 (1952); H.J. Res. 430, 82d Cong., 2d Sess., 66 Stat. 327 (1952).

our American history [with] no exact counterpart elsewhere in the world."[22]

One difference that could be recognized between a "commonwealth" and a "territory" is that a "commonwealth" involves a relationship between the United States and the commonwealth entity that has developed through a negotiating process or other historical relationship and that cannot be altered unilaterally by Congress. The Commonwealth of the Northern Marianas was established by a "covenant" agreed upon in 1975 by Congress and the people of the Northern Marianas.[23] The Commonwealth argues that it would be improper for the United States to be allowed to alter some aspect of this negotiated relationship unilaterally.[24] The broad power that Congress can exercise over territories pursuant to the Territory Clause of the United States Constitution[25] should not, according to this view, apply to commonwealths. The federal courts have, however, interpreted the 1950-52 Compact between the United States and Puerto Rico to permit Congress unilaterally to make at least some new federal statutes applicable in Puerto Rico.[26] Although it is possible to view this continuing authority as a more restrained power exercised pursuant to a negotiated agreement instead of the plenary power Congress enjoys over territories under the Territory Clause, the United States Supreme Court continues to refer to the broad power of the Territory Clause.[27]

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[22] Calvin Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1, 5 (1953). In Examining Board v. Flores de Otero, the U.S. Supreme Court wrote that "Puerto Rico occupies a relationship to the United States that has no parallel in our history . . . ." 426 U.S. 572, 596 (1976). *See also* Jose A. Cabranes, *The Status of Puerto Rico*, 16 INT'L & COMP. L. Q. 531 (1967); Juan M. Garcia-Passalacqua, *The Legality of the Associated Statehood of Puerto Rico*, 4 INTER-AM. L. REV. 287 (1962).

[23] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (set out under 48 U.S.C. § 1681 note (1987), *reprinted in* 15 I.L.M. 651 (1976)) [hereinafter CNMI Covenant]; *see infra* notes 190-223 and accompanying text.

[24] *See infra* notes 200-03 and accompanying text.

[25] U.S. Const. art. IV, § 3 (quoted *supra* note 2).

[26] *See infra* notes 149-84 and accompanying text.

[27] *See* Harris v. Rosario, 446 U.S. 651 (1980) (discussed *infra* notes 175-77).

For the position that Congress's power comes from the negotiated agreement rather than the Territory Clause, see, e.g., Hodgson v. Union de Empleados de los Supermercados Pueblos, 371 F. Supp. 56 (D.P.R. 1974) (*infra* notes 169-71 and accompanying text); United States v. Quinones, 758 F.2d 40 (1st Cir. 1985) (*infra* notes 178-84).

Case law also indicates that the Commonwealth of Puerto Rico is governed by the U.S. Constitution with regard to the protection of fundamental individual rights. In 1974, a three-judge federal district court invalidated on constitutional grounds Puerto Rico's anti-abortion statutes holding that the "fundamental" guarantees of the Constitution apply to the Commonwealth under the 1950-52 Compact.[28]

Whether "commonwealths" within the U.S. political community have the capacity to participate in international organizations without Congressional approval is an unresolved question.[29] The CNMI Covenant allows the CNMI "on its request" to participate in "regional and other international organizations concerned with social, economic, educational, scientific, technical and cultural matters when similar participation is authorized for any other territory or possession of the United States under comparable circumstances."[30] In 1987, the Commonwealth made inquiries to the South Pacific Forum Fisheries Agency to determine whether it might be possible to join, but they were advised that they could not.[31]

B. The Scope of Congress's Power Under the Territory Clause[32]

The extent to which Congress has ultimate power over U.S. territories has been a subject of debate for most of the nation's history. As of 1888, the United States consisted of only thirty-eight states. Between 1889 and 1896, seven new states were admitted, but Oklahoma achieved statehood only in 1907, and New Mexico and Arizona became states in 1912. In 1958 and 1959, Alaska and Hawai'i became the forty-ninth and fiftieth stars on the flag.

Until they became states, the extent to which Congress had power over these territories and the extent to which federal law would be applied to them was a topic of frequent contention. Today the same questions are relevant to American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U. S. Virgin Islands.

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[28] Montalvo v. Colon, 377 F. Supp. 1332 (D.P.R. 1974). A similar result was reached more recently in Guam. *See infra* notes 92-94 and accompanying text.

[29] *See* MICHAEL REISMAN, PUERTO RICO & THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION (1975); Richard Camaur, *The Feasibility of an Identifiable Role for Puerto Rico in Foreign Affairs*, 42 GEO. WASH. L. REV. 798 (1974).

[30] CNMI Covenant, *supra* note 23, § 904(c).

[31] Interviews with Don Woodworth, attorney for the CNMI, Washington, D.C. (1989-present).

[32] U.S. Const. art. IV, § 3, cl. 2.

C. The Applicability of the U.S. Constitution in the U.S.-Flag Insular Political Communities

As mentioned above, a territory usually becomes "incorporated" only if it is destined to become a state.[60] Other territories remain

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[54] *Id.* at 283 (second emphasis added).

[55] *See, e.g.*, United States v. Husband R. (Roach), 453 F.2d 1054 (5th Cir. 1971), *cert. denied*, 406 U.S. 935 (1972).

[56] *See infra* note 299 and accompanying text (discussing the power granted to the Alaska legislature).

[57] National Bank v. County of Yankton, 101 U.S. 129, 133 (1880).

[58] *See* Simms v. Simms, 175 U.S. 162 (1899).

> [I]n the territories Congress has the entire dominion and sovereignty, national and local, federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state, and may, at its discretion, entrust that power to the legislative assembly of the territory.

Id. at 168.

[59] *See infra* notes 119-33 and accompanying text.

[60] *See supra* note 9 and accompanying text.

"unincorporated" even though they have evolved into organized semi-autonomous self-governing political communities. In the 1990 decision of *United States v. Verdugo-Urquidez*, the United States Supreme Court restated the rule originally enumerated at the beginning of this century that only "fundamental" constitutional rights apply in unincorporated territories.[61] None of the existing U.S.-flag islands—American Samoa, Guam, the Northern Marianas, Puerto Rico, or the U.S. Virgin Islands—are "incorporated," but two of them (the Northern Marianas and Puerto Rico) have been denominated "commonwealths."[62] What, then, are the "fundamental" rights that apply to the residents of these island communities? Does the law that applies in a "commonwealth" differ from that which applies in other "unincorporated territories"?

One of the early attempts to define the category of rights that apply wherever the U.S. flag is flown is found in dicta from *Downes v. Bidwell*:

> We suggest, without intending to decide, that there may be a distinction between *certain natural rights*, enforced in the Constitution by prohibitions against interference with them, and what may be termed *artificial or remedial rights*, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage, *Minor v. Happersett*, 21 Wall. 162, and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some

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[61] 494 U.S. 259, 268-69 (1990).

> In *Dorr* [*v. United States*, 195 U.S. 138 (1904)], we declared the general rule that in an unincorporated territory—one not clearly destined for statehood—Congress was not required to adopt "a system of laws which shall include the right of trial by jury, and that *the Constitution does not, without legislation and of its own force, carry such right to territory so situated.*" 195 U.S. at 149 (emphasis added). Only "fundamental" constitutional rights are guaranteed to inhabitants of those territories. *Id.* at 148; *Balzac [v. Porto Rico*, 258 U.S. 298, 312-13 (1922)]; see *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976).

Id.; *see also* Wabol v. Villacrusis, 898 F.2d 1381, 1390 n.18 (9th Cir. 1990).

[62] *See infra* notes 148 and 192-94 and accompanying text.

> of which have already been held by the States to be unnecessary to the proper protection of individuals.[63]

Justice Brown's opinion thus draws upon the concept of "natural rights" to define the constitutional rights that are "fundamental" and thus applicable in all U.S. territories.

Many of the subsequent cases that have grappled with this issue concern whether jury trials must be granted to accused persons in the territories, and these decisions conclude that a jury trial is not necessarily "fundamental" for this purpose. In a 1902 case involving the newly acquired Territory of Hawaii, the United States Supreme Court found that the manslaughter conviction of a defendant who was not indicted by a grand jury and was convicted by only nine out of twelve jurors (in accordance with the law of the previous Republic of Hawaii) was valid even though it was not in compliance with the requirements of the Fifth and Sixth Amendments.[64]

The Court ruled that until Congress enacted laws for the newly acquired territory, the existing laws of the previous government would apply as long as they did not violate "fundamental" rights:

> We would even go farther and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case [grand jury indictment and unanimous jury verdict] are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being.[65]

This general waiver of Sixth Amendment rights for territorial residents is echoed in a subsequent Puerto Rico case:

> It is well settled that these provisions for jury trial in criminal and civil cases apply to the Territories of the United States . . . . But it is just as clearly settled that they do not apply to territory belonging to the United States which has not been incorporated into the union.[66]

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[63] 182 U.S. 244, 282 (1901) (emphasis added).

[64] Territory of Hawaii v. Mankichi, 190 U.S. 197, 217-18 (1902).

[65] *Id.*

[66] Balzac v. Porto Rico, 258 U.S. 298, 304 (1921); *see also* Dorr v. United States, 195 U.S. 138 (1904) (refusing to require an indictment by a grand jury in a criminal libel case in the Philippines); Ocampo v. United States, 234 U.S. 91 (1914) (holding

The applicability of the Sixth Amendment to trials in American Samoa and the Northern Marianas has been addressed in two more recent cases. Until 1977, residents of American Samoa had no right to a jury trial in a criminal case, but the absence of this protection was challenged by Jake King, a non-Samoan citizen residing in American Samoa who was charged with willful failure to pay income taxes and to file annual tax returns.[67] After King was found guilty of the allegations by the High Court of American Samoa without benefit of a jury trial,[68] he appealed his conviction to the District Court for the District of Columbia, claiming that the Secretary of the Interior had failed to provide the Constitutional guarantee of the right of trial by jury in a criminal proceeding.[69]

The district court dismissed the action for lack of jurisdiction,[70] but the United States Court of Appeals for the District of Columbia reversed and remanded the matter back to the district court, instructing it to determine whether the implementation of a jury system was "practicable" in light of "the Samoan mores and *matai* culture with its strict societal distinctions."[71]

District Judge Bryant then took the testimony of thirteen witnesses including eight native Samoans, four government officials, and the noted anthropologist, Margaret Mead.[72] None of those testifying favored immediate implementation of the jury system,[73] but the judge nonetheless found that because of the educational advances in American Samoa and the use of other aspects of the Anglo-American legal system it was practical to implement the jury system there.[74] Juries are thus

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that jury trial was not required in a misdemeanor criminal libel case in Puerto Rico); Government of Virgin Islands v. Rijos, 285 F. Supp. 126, 129 (D.V.I. 1968) ("It is settled that the right to trial by jury and Grand Jury presentments are not among those fundamental rights and therefore do not apply to the Virgin Islands without Congressional approval.").

[67] King v. Morton, 520 F.2d 1140, 1142 (D.C. Cir. 1975).

[68] *Id.* (citing Government of American Samoa v. King, Crim. Case No. 785 (High Ct. Am. Samoa, Trial Div., decided Dec. 11, 1972)).

[69] *Id.* at 1143.

[70] *Id.*

[71] *Id.* at 1147.

[72] Arnold H. Leibowitz, *American Samoa: Decline of a Culture*, 10 CAL. W. INT'L L. J. 220, 262-63 (1980) (citing from the record).

[73] *Id.*

[74] King v. Andrus, 452 F. Supp. 11 (D.D.C. 1977).

now available in American Samoa and appear to be working properly.[75]

A similar question arose in the Northern Marianas, whose Covenant[76] provides an exception to the Constitution's requirements for jury trials.[77] The Constitution of the Northern Mariana Islands provides that jury trials *may* be authorized by the legislature for civil and criminal cases,[78] and the legislation then in force authorized jury trials in the Marianas only if the offense was punishable by more than five years imprisonment or a $2000 fine.[79] This restriction was challenged by Daniel Atalig who was accused of possessing marijuana, an offense punishable by one year imprisonment or $1,000 fine or both.[80]

Rejecting the district court's holding that the *Insular Cases* had been overruled by *Duncan v. Louisiana*,[81] the United States Court of Appeals for the Ninth Circuit held that the *Insular Cases* were appropriate in this setting.[82] Using "a cautious approach," the court held that the provisions of the CNMI Covenant and Constitution restricting the right to a jury trial did not violate "either the Sixth or Fourteenth Amendments to the Constitution."[83] The court noted that both the CNMI Covenant and Constitution provided other procedural safeguards for criminal defendants.[84] In rejecting the argument that *Duncan* overruled the *Insular Cases*, the Court of Appeals concluded that the

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[75] Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 337, 376 (1981) (citing Damon, *The First Jury Trials in American Samoa*, 5 SAMOAN PAC. L. J. 31, 38 (1979)).

[76] CNMI Covenant, *supra* note 23, art. V, § 501. "[P]rovided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law except where required by local law." *Id.*

[77] U.S. CONST. amends. VI, VII, & XIV.

[78] N. MAR. I. CONST. art. I, § 8.

[79] Commonwealth of the Northern Mariana Islands v. Atalig, 723 F.2d 682, 684 (9th Cir. 1984) (citing 5 TRUST TERR. CODE § 501(1).

[80] *Id.* (citing 63 TRUST TERR. CODE § 292(3)(c)).

[81] 391 U.S. 145 (1968). *Duncan* held that the right to a jury trial is a "fundamental" right under the 14th Amendment's Equal Protection Clause. *Id.* at 157-58

[82] 723 F.2d at 688.

The Insular Cases held that the Fifth Amendment right to grand jury indictment and the Sixth Amendment right to trial by jury are nonfundamental rights that do not apply to unincorporated territories. E.g., Balzac v. Porto Rico, 258 U.S. 298, 309 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 182 U.S. 244 (1901). *Id.*

[83] *Id.* at 690.

[84] *Id.*

notion of "fundamental rights" for purposes of determining whether rights apply in the territories requires a different analysis from that which applies to the question of whether an element in the Bill of Rights applies to the states under the incorporation doctrine.[85] No specific test is provided for future guidance, but the court emphasizes that respect should be given to the "cultures, traditions, and institutions" of the insular community and that the resulting procedure should be fair.[86]

Another area of uncertainty concerns the applicability of all aspects of the Fourteenth Amendment's Due Process and Equal Protection Clauses to the U.S. insular political communities. The Supreme Court touched upon this issue in the case of *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*[87] in which it invalidated a Puerto Rico statute that said only U.S. citizens could be civil engineers.[88] In this decision, the Court briefly reviewed the ambiguity that exists regarding Puerto Rico's status,[89] but stated explicitly that "the protection accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico."[90]

In 1990, the Guam Legislature enacted a statute restricting access to abortions.[91] The attorneys attempting to defend this statute in the Guam Federal District Court argued that the right to privacy which protects the right to obtain an abortion under the Constitution[92] does not apply in Guam because it is a territory.[93] The U.S. district court

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[85] *Id.* at 689.

[86] *Id.* The *Atalig* result was affirmed by the CNMI Supreme Court in Northern Mariana Islands v. Peters, Appeal No. 90-026 (CNMI Jan. 8, 1991).

See also United States v. Christian, 660 F.2d 892, 898-99 (3d Cir. 1981) (relying on the *Insular Cases* for the proposition that the Fifth Amendment grand jury requirement does not apply in the Virgin Islands).

[87] 426 U.S. 572 (1976).

[88] *Id.* at 599-606.

[89] *Id.* at 599-601.

[90] *Id.* at 600 (citing Downes v. Bidwell, 182 U.S. 244, 283-84 (1901); Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922); Reid v. Covert, 354 U.S. 1 (1957); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)).

[91] Pub. L. No. 134 (enacted Mar. 19, 1990, signed into law Mar. 23, 1990).

[92] *See* Roe v. Wade, 410 U.S. 113 (1973).

[93] In 1968, Congress amended Guam's Bill of Rights to state that the Due Process and Equal Protection Clauses in the Fourteenth Amendment of the Constitution would have "the same force and effect" in Guam "as in the United States or in any State of the United States." 48 U.S.C. § 1421 b(u) (1988). The attorneys defending Guam's

judge rejected this claim and struck down the Guam statute,[94] but the fact that this argument was made by the Guam Governor illustrates the continuing uncertainty about how the Constitution applies in the U.S.-flag islands.

A result that is based on a different approach to this issue was reached by the United States Court of Appeals for the Ninth Circuit in the case of *Wabol v. Villacrusis*,[95] which involved the important issue of whether the CNMI can restrict the acquisition of permanent and long-term interests in land to "persons of Northern Marianas descent."[96]

Although this nonalienation-of-land provision has been criticized as being a violation of the rights guaranteed under the Constitution,[97] it

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abortion statute argued that the meaning of these clauses as applied to Guam was frozen in time as of 1968, and therefore that no post-1968 judicial decision, i.e., Roe v. Wade (1973), would apply unless Congress affirmatively ruled that it should.

[94] *See* Guam Society of Obstetricians and Gynecologists v. Ada, D.C. No. CV-90-00013-ARM, slip op. at 16-17, *affirmed*, 962 F.2d 1366 (9th Cir. 1992). District Judge Alex R. Munson characterized the argument presented, *supra* note 93, as a "singular reading of the Organic Act," *id.* at 12 n.6, and said that it appeared to him that:

> The express words of the statute [48 U.S.C. § 1421 b(u)] demonstrate that Congress intended that the people of the Territory of Guam would from 1968 onward be afforded the full extent of the constitutional protections added to Guam's Bill of Rights, as those rights are found in the United States Constitution and as they are construed and articulated by the United States Supreme Court.

Id. at 13-14.

Neither counsel nor Judge Munson addressed whether the Due Process and Equal Protection Clauses would apply of their own force in Guam, without regard to whether Congress had enacted the 1968 amendments. *See also supra* note 28 and accompanying text.

[95] 898 F.2d 1381 (9th Cir. 1990), *as amended*, 908 F.2d 411, *as amended*, 958 F.2d 1450, *cert. denied sub nom* Philippine Goods, Inc. v. Wabol, 61 U.S.L.W. 3419 (Dec. 7, 1992).

[96] *Id.* at 1382-83. This limitation is found in the CNMI Const. art. XII, §§ 1, 3. Art XII, § 4 defines "persons of Northern Marianas descent" as follows:

> A person of Northern Marianas descent is a person who is a citizen or national of the United States who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas descent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

Id. A similar provision is found in the AM. SAMOA CODE ANN. § 27.0204 (1987).

[97] James A. Branch Jr., *The Constitution of the Northern Mariana Islands: Does a Different*

was insisted upon by the Congress[98] as a continuation of the U.S. policy in Micronesia which had prohibited alienation of similar long interests in land to non-Micronesians without the approval of the High Commissioner of the Trust Territory.[99]

The Ninth Circuit's opinion, written by Judge Cecil Poole, framed the question in *Wabol* as follows: "whether the constitutional guarantee of equal protection of the laws limits the ability of the United States and the Commonwealth to impose race-based restrictions on the acquisition of permanent and long-term interests in Commonwealth land."[100] The court began its answer by repeating the principle derived from the *Insular Cases* that "the entire Constitution applies to a United States territory *ex proprio vigore*—of its own force—only if the territory is 'incorporated.'"[101] It then asked the further question, "Is the right of equal access to long-term interests in Commonwealth real estate, resident in the equal protection clause, a fundamental one which is beyond Congress's power to exclude from operation in the territory under Article IV, section 3 [the Territory Clause]?"[102]

Cultural Setting Justify Different Constitutional Standards, 9 DEN. J. INT'L L. & POL'Y 35, 60 (1980):

> Since these land restrictions are based in fact on purely racial considerations, and since they would deprive many sellers of access to markets, and since they would amount to a "taking," this nonalienation of land provision would seem to violate at least three provisions of the United States Constitution: (a) the equal protection clause of the fourteenth amendment; (b) the privileges and immunities clause of the fourteenth amendment, Article IV, Section 2; and (c) the fifth amendment prohibition against the taking of property without just compensation.

Id.

[98] *See* Howard P. Willens & Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L J. 1373, 1406 (1977). This restriction is required by section 805 of the CNMI Covenant, *supra* note 23. *See* Arnold H. Leibowitz, *The Marianas Covenant Negotiations*, 4 FORDHAM INT'L. L.J. 19, 70 (1981).

[99] *See* WILLENS & SIEMER, *supra* note 98, at 1407 (citing Trust Terr. Code tit. 57 § 1110.1 (1970)). The United States insisted upon this prohibition on land alienation to protect the people of the Northern Mariana Islands from exploitation. *Id.* at 1406. This protection had three goals: (1) "to protect the culture and traditions" of the CNMI; (2) "to promote their economic advancement;" and (3) to minimize economic dislocation. *Id.* This provision was thought necessary in view of the experiences on Guam, where more than half of the private land was alienated from the native population. *Id.*

[100] 898 F.2d at 1382.

[101] *Id.* at 1390 (citing Balzac v. Porto Rico, 258 U.S. 298 (1922)).

[102] 898 F.2d at 1390.

To answer this question, Judge Poole reviewed the *Atalig* analysis[103] and agreed that the word "fundamental" under the Territory Clause has a different meaning than it has under the Equal Protection Clause:

> What is fundamental for purposes of Fourteenth Amendment incorporation is that which "is necessary to an Anglo-American regime of ordered liberty." *Duncan* [*v. Louisiana*] 391 U.S. at 149-50 n.14. In contrast, "fundamental" within the territory clause are "'those . . . limitations in favor of personal rights' which are 'the basis of all free government.'" *Atalig*, 723 F.2d at 690 (quoting *Dorr v. United States*), 195 U.S. 138, 146, 147 (1904)). In the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures. Thus, the asserted constitutional guarantee against discrimination in the acquisition of long-term interests in land applies only if this guarantee is fundamental in this international sense.[104]

Judge Poole then took the test from *King v. Morton*,[105] the case involving jury trials in American Samoa, which required a determination whether "this particular constitutional guarantee would be impractical and anomalous in the Commonwealth and therefore should not be imposed."[106] Because the scarce land in the Northern Marianas plays a "vital role . . . in the preservation of NMI social and cultural stability"[107] and because the United States made a "solemn and binding undertaking memorialized in the Trusteeship Agreement" to preserve local culture and land in the Marianas,[108] requiring the free alienation of land by "interposing" the constitutional requirements of the Equal Protection Clause "would be both impractical and anomalous in this setting."[109]

> *The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures* . . . . Its bold purpose was to protect minority rights, not to enforce homogeneity. Where land is so scarce, so precious, and so vulnerable to economic predation, it is understandable that the islanders' vision does not precisely coincide with mainland attitudes

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[103] *Id.* at 1390-91.
[104] *Id.* at 1390.
[105] 520 F.2d 1140, 1147 (D.C. Cir. 1975) (quoting Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)).
[106] 898 F.2d at 1391.
[107] *Id.* at 1391.
[108] *Id.* at 1392.
[109] *Id.* at 1392.

> toward property and our commitment to the ideal of equal opportunity in its acquisition. *We cannot say that this particular aspect of equality is fundamental in the international sense.*[110]

The court also felt that the role of Congress was important in defining the proper balance of rights and was heavily influenced by the decision of Congress to authorize the nonalienation provision.[111]

D. Summary

The analysis in this section has focused on the problem areas, but it should also be emphasized that most of the constitutional rights accorded to U.S. citizens in the fifty states also apply to residents of the U.S.-flag insular political communities. In *Territory of Hawaii v. Mankichi*,[112] for instance, although the Court held that the rights to grand jury indictment and jury trial were not fundamental in nature,[113] its opinion stated that "most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply [to the territory] from the moment of annexation."[114]

More recently, the Court held in 1979 that the constitutional requirements of the Fourth Amendment's protection against unreasonable searches and seizures apply in Puerto Rico,[115] and indicated in that

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[110] *Id.* at 1392 (emphasis added). In an apparent effort to address the statements in Downes v. Bidwell and *Flores de Otero* (quoted *supra* notes 63 and 90), Judge Poole offered the following statement:

> It is important to distinguish between the right claimed under the equal protection clause and the right to equal protection itself. *Atalig* held that not every right subsumed within the due process clause can ride the fundamental coattails of due process into the territories. The same must be true of the equal protection clause. It is the specific right of equality that must be considered for purposes of territorial incorporation, rather than the broad general guarantee of equal protection.

Id. at 1390 n.19.

[111] *Id.* at 1392.

[112] 190 U.S. 197 (1903).

[113] *Id.* at 217-18.

[114] *Id.* at 217-18; *see also supra* note 63 and accompanying text (quoting Downes v. Bidwell). An attempt to provide a comprehensive overview of this subject can be found in GOV'T ACCT. OFF., U.S. INSULAR AREAS: APPLICABILITY OF RELEVANT PROVISIONS OF THE U.S. CONSTITUTION (June 1991).

[115] Terrol Torres v. Commonwealth of Puerto Rico, 442 U.S. 465 (1979).

same case that the First Amendment's speech clause,[116] the Due Process Clause,[117] and the Equal Protection Clause also apply.[118]

It is in the area of political participation that residents of the insular communities are primarily disadvantaged. They are not permitted to participate in presidential elections nor do they have full and effective voting representation in the Congress.

The Territories of American Samoa, Guam, and the U.S. Virgin Islands each elect a "Delegate" to the House of Representatives every two years.[119] These three individuals have offices in the House and receive salaries and expenses equal to those of full members of the House.[120] They also are allowed to sit on certain committees, can chair these committees or their subcommittees, can introduce legislation, and can vote in the committees and subcommittees.[121] They *cannot*, however, vote when the House meets in plenary session to consider final passage of legislation and budgets.[122] Moreover, they have no status whatsoever on the Senate side of the Congress. This inability to affect the ultimate fate of matters being considered by Congress so reduces the power of these island Delegates that they are essentially only advocates for the needs of their people rather than functioning legislators for the nation. In the final analysis, they cannot block or promote legislation effectively because they cannot form meaningful coalitions and have no vote to trade.

The Commonwealth of Puerto Rico has a "Resident Commissioner" to the United States who is elected for a four-year term.[123] This individual has the same rights and privileges as the three island Delegates described above,[124] and again has no vote when final decisions

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[116] *Id.* at 469 (citing Balzac v. Porto Rico, 258 U.S. 298, 314 (1922)).

[117] *Id.* (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668-69 n.5 (1974)).

[118] *Id.* (citing Examining Board v. Flores de Otero, 426 U.S. 572, 599-601 (1976)). The Court also stated, "In Califano v. Torres, 435 U.S. 1, 4 n.6 (1978) (per curiam), we assumed without deciding that the constitutional right to travel extends to the Commonwealth." *Id.*

[119] 48 U.S.C. § 1711-12 (1988) (Guam and the Virgin Islands); 48 U.S.C. § 1731-32 (1988) (American Samoa).

[120] *Id.*

[121] *See generally* LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 7-8, 286, 342.

[122] 48 U.S.C. §§ 1711 (1972), 1731 (1978).

[123] 48 U.S.C. § 891 (1987).

[124] *See supra* notes 119-21 and accompanying text; 48 U.S.C. § 894 (1988); LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 224-27.

are made.[125] The Commonwealth of the Northern Mariana Islands has a "Resident Representative" to the United States[126] who is also now elected for a four-year term pursuant to CNMI law. This person presents his or her credentials to the Department of State and represents the CNMI in its dealings with all branches of the federal government.[127] The CNMI Resident Representative has no statutorily authorized privileges in Congress;[128] in contrast to the case of the Delegates and Resident Commissioner, whose salary and staff are provided by the Congress, the CNMI pays for all the expenses and salary of its Representative.

The islanders likewise are denied effective input into the result of presidential elections.[129] This inability to participate fully in the U.S. democratic system is a matter of serious concern in the islands and reinforces the islanders' perception that they are being kept in a second class, semi-colonial status.[130] Numerous suggestions have been made to increase the ability of the islanders to participate in Congress[131] and in the Presidential elections,[132] but none of them have been taken seriously by the voting members of Congress.[133]

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[125] 48 U.S.C. § 891 (1917).

[126] CNMI Covenant, *supra* note 23, § 901.

[127] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 564.

[128] *Id.* The CNMI is authorized to request that its Resident Representative be given the same nonvoting privileges granted to the other island Delegates. *Id.* at 564 n.204, (quoting from Report of the Covenant Drafting Committee at C-4). No such request has been made thus far because the CNMI is seeking a status different from that of the other island communities.

[129] They are now able to participate in party conventions to help select the nominees but cast no votes in the final elections.

[130] *See* LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 41.

> The intensity of feeling on this political representation issue cannot be underestimated [sic? overestimated?]. All of the territories have been concerned at their lack of political participation. It cuts across all status and party lines. Despite that, and this is most disturbing, there is an absence of similar concern in either the Executive Branch or Congress.

Id.

[131] *Id.*

[132] Ron de Lugo, Delegate from the Virgin Islands, has introduced several proposed constitutional amendments to allow the islanders to vote in Presidential elections, modeled on the 25th Amendment which gives residents of the District of Columbia this opportunity. None of these proposals has even been granted a hearing in Congress. *Id.* at 286; *see also id.* at 149 (citing Sanchez v. United States, 376 F. Supp. 239 (D.P.R. 1974) (holding that Puerto Ricans are not entitled to vote in Presidential elections even though they are U.S. citizens)).

[133] *Id.* at 41 and 286.

Although each island has substantial self government,[134] Congress can apparently override local legislation in most situations. Whether limits exist on this power of Congress is the topic of the next sections.

The applicability of the Due Process and Equal Protection Clauses is also uncertain. Although strong statements are made in *Downes v. Bidwell*[135] and *Flores de Otero*[136] that these clauses protect individual liberties in the insular communities, the *Wabol* analysis and result discussed above[137] indicate that Congress can limit the full applicability of these clauses to respect local conditions and protect cultural traditions.

III. Is The Power of Congress to Legislate Pursuant to the Territory Clause Limited By Other Parts of the Constitution, By Agreements Reached Between the United States and the Residents of the Territory, or By International Law?

A. Constitutional Limits on Congress's Power Under the Territory Clause

All parts of the Constitution must be read as a cohesive whole[138] and so it is logical to conclude that Congress cannot violate the parts of the Constitution designed to protect individual liberties when it exercises power under the Territory Clause. Although certain parts of the Bill of Rights have not been held applicable to the territories, the previous sections explain that the "fundamental" rights do apply and thus limit Congress's power.[139] Congress could not, therefore, deny the rights of free speech to citizens of Guam or American Samoa.[140] More

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[134] Although Congress's discretion is the measure by which the participation of the people in political authority can be determined, it is required "to recognize the principle of self-government to such extent as may seem wise." Dorr v. United States, 195 U.S. 138, 148 (1904) (citing Cooley, Principles of Constitutional Law 164).

[135] *See supra* text accompanying note 63 (quoting *Downes*).

[136] *See supra* text accompanying note 90 (quoting *Flores de Otero*).

[137] *See supra* notes 95-111 and accompanying text.

[138] *See e.g.*, New York Times v. U.S., 403 U.S. 713, 761 (Blackmun, J., dissenting).

[139] *See supra* notes 60-137 and accompanying text (especially quote at note 63).

[140] *See, e.g.*, Nelson v. United States, 30 F. 112, 115 (Cir. Ct. D. Or. 1887):

> In the exercise of this power, however, congress cannot do or authorize any act or pass any law forbidden by the constitution; as suspending the writ of *habeas corpus* in time of peace, passing a bill of attainder or *ex post facto* law, (article 1, § 9,) quartering a soldier in a house without the consent of the owner in time of peace, making a law respecting an establishment of religion, ([F]irst and [S]econd amendments) and others.

Id.

difficult questions arise, as the discussion of *Wabol* above[141] explains, when Congress is acting to protect the cultural identity of an island community and restricts freedoms that exist in the states to achieve that result.

B. Limitations Based on Agreements with the Inhabitants of the Islands

If the Congress agrees to a negotiated compact or covenant with an island community, does that agreement serve to restrict the power of subsequent Congresses to legislate under the Territory Clause? This question raises complicated issues of constitutional and international law and does not seem to have a definitive answer. The better view is that a compact or covenant should have the capacity to restrain subsequent Congresses, because that is the only way to provide the proper respect owed to the inhabitants of a U.S.-flag political community and the autonomy they deserve and to meet the responsibilities owed to them under international law. This question has been raised in particular regarding Puerto Rico's 1950-52 compact and the Northern Marianas' 1975 covenant, and these two situations will be examined in turn.

1. Puerto Rico

Puerto Rico was acquired by the United States from Spain in 1898 after the Spanish-American War.[142] The U.S. military governed the island until Congress passed the Foraker Act,[143] which provided for the establishment of a local government. Initially, the Puerto Rico political structure was headed by appointees of the President, and locally passed legislation could be vetoed by the President or by Congress. In 1917, Congress passed an Organic Act of Puerto Rico,[144] granting citizenship to most Puerto Ricans and providing some local autonomy,[145] but Puerto Rico remained a "territory" subject to Congress's control.[146]

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[141] *See supra* notes 95-111 and accompanying text.

[142] Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754 (1898).

[143] 31 Stat. 77 (1900) (codified at 48 U.S.C. § 731 (1900)).

[144] Pub. L. No. 368, 39 Stat. 951 (1917) (codified at 48 U.S.C. § 731-916 (1988)).

[145] *See* Americana of Puerto Rico, Inc. v. Kaplus, 368 F.2d 431, 434 (3d Cir. 1966).

[146] *See, e.g.*, Cases v. United States, 131 F.2d 916 (1st Cir. 1942) (describing Puerto Rico as an organized but unincorporated territory and stating that Congress's power over such a territory is plenary "except as limited by express constitutional restrictions").

In fact, however, between 1898 and 1950, Congress never used its power to annul any law enacted by Puerto Rico's legislature. David M. Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 452, 458 (1985).

3. The Commonwealth of the Northern Mariana Islands

In the late 1960s, the Northern Mariana Islands and the other islands in the Trust Territory of the Pacific Islands began negotiating with the United States to end the Trusteeship.[190] Because of distinct cultural, ethnic, and political differences between the Northern Marianas and the other islands in the trust territory, the Northern Marianas entered into separate status negotiations with the United States in 1972.[191] These negotiations culminated with the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" in 1975.[192] A decade later, on November 3, 1986, the Covenant was pronounced as being in full force and effect by Presidential Proclamation, thus officially ending the Trusteeship Agreement at least as far as the United States is concerned.[193]

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[188] *See infra* notes 303-12 and accompanying text.

[189] *See infra* notes 285-98 and accompanying text.

[190] *See* LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 526-27.

[191] *Id.* at 528.

[192] CNMI Covenant, *supra* note 23; *see generally* LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 526-36.

[193] Exec. Order No. 12572, Authority of the Secretary of the Interior with Respect to the Northern Mariana Islands, Nov. 3, 1986, 51 C.F.R. 40401 (1986), *reprinted in* 48 U.S.C. § 1681 (1986). The United Nations Security Council formally terminated the Trust (except for Palau) in December 1990. S.C. Res. 683 (Dec. 22, 1990).

Under Section 101 of the Covenant, the Northern Marianas became a self-governing commonwealth in political union with and under the United States.[194] The meaning of the term "self-government" has, however, been the center of much debate.[195] Section 103 gives the CNMI what appears to be plenary power over internal affairs.[196] Under Section 105,[197] however, the United States may enact legislation that will be directly and uniquely applicable to the CNMI, if the CNMI is directly named. The core or fundamental elements of the Covenant[198]

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[194] CNMI Covenant, *supra* note 23, § 101 provides, "The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the "Commonwealth of the Northern Mariana Islands," in political union with and under the sovereignty of the United States of America." *Id.*

[195] In the recent "Section 902" consultations, the United States and the CNMI stated they will "continue to strive to reach agreement and understanding of the meaning of the term as used in the Covenant." The Special Representative of the President of the United States and the Special Representative of the Governor of the Commonwealth of the Northern Mariana Islands, Agreements After the Eighth Round of Consultations, Apr. 12, 1990, paras. 13-15.

[196] CNMI Covenant, *supra* note 23, § 103 provides, "The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption." *Id.*

[197] *Id.* § 105 provides:

> The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with consent of the Government of the United States and the Government of the Northern Mariana Islands.

Id.

Section 105 of the Covenant thus contains two limitations on federal legislative authority: (1) a procedural requirement that federal legislation specifically mention the CNMI if it is to be applicable to the commonwealth but not also applicable to the states, and (2) the substantive requirement that the mutual consent of the commonwealth be granted as to federal laws within some critical areas. *See* LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 542. "The latter is a unique, specific limitation of Congress' territorial clause authority." *Id.* at 543.

[198] CMNI Covenant, *supra* note 23, art. II (form of local government); *id.* art. III (citizenship rights); *id.* § 805 (applicable parts of the U.S. CONST.). These core or

cannot, however, be altered without agreement of the CNMI. Sections 501[199] and 502 provide for the applicability of certain U.S. constitutional provisions and laws to the Marianas, and Section 503 lists other U.S. laws that will not apply (unless Congress later specifically decides that they should).

The CNMI view is that the Covenant is clear and unambiguous as to the boundaries of each party's share of sovereignty, and that the sovereignty retained by the CNMI when it entered into the Covenant relationship is plenary.[200] In exercising its sovereignty and power to govern its own affairs, the CNMI entered into a limited political union with the United States and delegated a limited and finite portion of sovereignty to the United States.[201]

The Commonwealth Legislature argued before the United Nations in 1986 that the Territory Clause was completely inapplicable and that

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fundamental elements concern the form of local government in the CNMI (art. II), the citizenship rights of the residents of the CNMI (art. III), the parts of the U.S. CONST. that apply (§ 501, quoted *infra* note 199), and the provision on nonalienability of land (§ 805). Stella Guerra uses the term "fundamental" when referring to those elements of the relationship that cannot be unilaterally altered by Congress. *See infra*, note 238 and accompanying text.

[199] CNMI Covenant, *supra* note 23, § 501 provides:

> (a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3, and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15; Amendment 19; and Amendment 26; provided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with approval of the Government of the Northern Mariana Islands and of the Government of the United States.
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> (b) The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to Sections 203, 506 and 805 and the proviso in Subsection (a) of this Section.

Id.

[200] *See* Commonwealth of the Northern Marianas Legislature, SELF-DETERMINATION REALIZED at 15, 21 (1986).

[201] *Id.* at 20-21.

mutual consent was required before any act of Congress could apply to the Commonwealth. In a document entitled *Self-Determination Realized*, the CNMI Legislature argued that the clause's exclusion was intended "to insure against Congress's use of an independent plenary source of power to encroach upon the sovereign prerogatives of the CNMI."[202] It further argued that neither Congress nor any other branch or agency may use the Territory Clause or any other source of power to supersede the sovereign power of the CNMI to control and regulate matters of local concern.[203]

The U.S. view is that although the CNMI reserved the right to organize its own local government in the Covenant, the Territory Clause of the Constitution gives the Congress full authority to legislate regarding matters in the commonwealth.[204] The Covenant itself gives Congress authority to enact legislation for the CNMI that has only a local impact. Under Section 105, for instance, Congress may enact laws for the CNMI that cannot also be made applicable to the several states. The mutual consent requirement is applicable only to selected provisions in the Covenant (articles I, II, III, and sections 501 and 805), and these limits undercut the contentions of the CNMI that it applies to the entire Covenant.

The question whether the Covenant acts as a restraint on Congress's power to pass legislation governing the CNMI or the executive branch's power to regulate its activities has arisen most recently in the context of efforts by the Inspector General of the Department of Interior to subpoena records of the Mariana Islands Housing Authority to audit the expenditures of funds provided by the federal government to the Authority. The Authority refused to make their records available on the ground that the audit was contrary to the autonomy and self-governance of the CNMI as recognized in the Covenant.[205] The United States then filed a forty-seven-page brief in the United States Court of Appeals for the Ninth Circuit to challenge the Authority's refusal to provide the records.[206] This brief argues not only that the audit is justified because federal funds are involved[207] but more dramatically

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[202] *Id.* at 26.

[203] *Id.*

[204] *See generally* Brief of Appellee (United States), United States *ex rel* Richards v. Sablan, No. 89-16404 (9th Cir. Mar. 1990) [hereinafter U.S. Brief].

[205] *Id.* at 2, 8.

[206] *Id.*

[207] *Id.* at 19.

that the federal government has unlimited power to intrude into the internal affairs of the CNMI[208] and that this audit is authorized by the Insular Areas Act,[209] which instructs the Inspector General to audit all activities of the CNMI government.

The brief quotes from the Report of the Marianas Political Status Commission (M.P.S.C.), which was distributed prior to the plebiscite in the Northern Marianas on the Covenant, to support the proposition that Congress would retain the power to legislate under the Territory Clause and that this retained power was understood.[210] The brief argues that "the Covenant creates no preserve of independent sovereignty for the CNMI"[211] and thus that Congress is free to legislate without restraint from the Covenant concerning the CNMI.

The full force of the arguments made by the United States are found in four long footnotes in this brief. Footnote 8 argues that the U.S.-CNMI relationship is "territorial in nature"[212] and that this relationship was well understood by the inhabitants when they voted for commonwealth status. "While the Covenant describes the Northern Marianas as a Commonwealth, the term 'commonwealth' simply denotes a territory in which the 'local government is the product of a constitutional convention rather than an Organic Act of Congress.'"[213]

Footnote 13 rejects the CNMI argument "that the territorial clause is not applicable to the U.S.-CNMI relationship because that clause is not listed in section 501 of the Covenant." The U.S. position is that the Territory Clause is "applicable of its own force to all areas under the sovereignty of the United States that are not states" thus does not need to be listed in section 501.[214]

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[208] *Id.* at 24-29.

[209] 48 U.S.C. § 1681 (1986).

[210] U.S. Brief, *supra* note 204, at 11 n.8 (quoting from the M.P.S.C. Report, *reprinted in Hearing Before the Senate Comm. on Interior and Insular Affairs on S.J. Res. 107, Joint Resolution to Approve the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" and for Other Purposes*, 94th Cong., 1st Sess. (1975)); *see also* LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 540-41 (1989) (supporting the view that both sides understood that the Territory Clause would apply).

[211] U.S. Brief, *supra* note 204, at 27.

[212] *Id.* at 10 n.8 (quoting from Micronesian Telecommunications Corp. v. NLRB, 820 F.2d 1097, 1100 n.2 (9th Cir. 1987)).

[213] *Id.* at 11 n.8 (citing S. REP. No. 596, 94th Cong., 1st Sess. 2, *reprinted in* 1976 U.S.C.A.N. 449).

[214] *Id.* at 15 n.13 (citing National Bank v. County of Yankton, 101 U.S. 129 (1880) (discussed *supra* at notes 33-36 and accompanying text)).

Footnote 25 similarly rejects the "CNMI's argument that the self-government provisions of the Covenant is 'in fulfillment' of the United States' obligations under the Trusteeship Agreement and therefore should be interpreted expansively." The U.S. Brief argues that the U.S. "Trusteeship obligation" was fulfilled when the people of the Northern Marianas "freely chose union with the United States under a territorial arrangement," and rejects the notion "that the United States has a continuing trust obligation."[215]

Finally, footnote 30 rejects the CNMI position that the provisions of the Covenant cannot be altered except by mutual consent and says that the "Covenant, like all other laws or treaties, is 'generally subject to amendment or repeal by a later law of the United States.'"[216]

The United States thus argues that the Covenant provides no restraint whatsoever on the ability of the Congress to legislate regarding the CNMI pursuant to the Territory Clause,[217] and that the obligations of the United States under international law similarly provide no restraint on the federal government's treatment of the CNMI. Is this position sound? The international law issues will be addressed below.[218] The issues under U.S. law are related to the cases regarding Puerto Rico discussed above[219] and some additional cases regarding the CNMI are also relevant.

The unique legal status of the CNMI has been recognized on at least three occasions by the United States Court of Appeals for the Ninth Circuit in recent years. In a 1984 decision, prior to the Presidential Proclamation ending the Trusteeship over the Northern Marianas, the Court included the following footnote in its opinion:

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[215] *Id.* at 26 n.25. The weakness of this argument is discussed *infra* at notes 303-12 and accompanying text.

[216] *Id.* at 32-33 n.30 (citing Second Interim Report on 45 (citing Sutherland, *Statutes and Statutory Construction* §§ 23.03, -23.09, 36.07 (Sands ed., 1973))). Compare the opposite perspective offered earlier with regard to the contractual relationship with Puerto Rico, *supra* note 158 and accompanying text.

[217] This position was also adopted by Tim Glidden, the U.S. representative to the 1990 "Section 902" negotiations between the United States and the CNMI. Max Taylor, *Glidden Backs Territorial Clause*, *The Tribune* (Saipan), Apr. 12, 1990, at 3, col. 1. Glidden is quoted as having said "if the Territorial Clause did not apply, a situation involving free association with the U.S. would exist, and the CNMI chose not to enter into such an arrangement." *Id.* at 4.

[218] *See infra* notes 303-12 and accompanying text.

[219] *See supra* notes 149-87 and accompanying text.

> The NMI argues that its political status is distinct from that of unincorporated territories such as Puerto Rico. This argument is credible. Under the trusteeship agreement, the United States does not possess sovereignty over the NMI. As a commonwealth, the NMI will enjoy a right to self-government guaranteed by the mutual consent provisions of the Covenant . . . . No similar guarantees have been made to Puerto Rico or any other territory. . . .
>
> Thus, there is merit to the argument that the NMI is different from areas previously treated as unincorporated territories. We need not decide this issue because the independent force of the Constitution is certainly no greater in the NMI than in an unincorporated territory.[220]

In 1988, the same appellate court explicitly distinguished the political status of the CNMI from that of Guam:

> Guam's relationship with the United States government distinguishes this case from *Fleming v. Department of Public Safety*, 837 F.2d 401 (9th Cir. 1988), where we held that the Commonwealth of the Northern Mariana Islands (CNMI) is a person for the purposes of section 1983. *Id.* at 406. *CNMI has a unique relationship with the United States*; the original Trusteeship Agreement obligated the United States to "promote the development of the inhabitants of the trust territory toward self-government or independence;" see Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, art. 6 § 1, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189, quoted in *Fleming*, 837 F.2d at 403. Significantly, "the United States does not possess sovereignty over the Trust Territory" but merely "exercises powers of administration, legislation, and jurisdiction . . . pursuant to an agreement with the United Nations." *United States v. Covington*, 783 F.2d 1052, 1055 (9th Cir. 1985), *cert. denied*, 479 U.S. 831, 107 S. Ct. 117, 93 L.Ed.2d 64 (1986); *Commonwealth of Northern Mariana Islands v. Atalig*, 723 F.2d 682, 684 (9th Cir.), *cert. denied*, 467 U.S. 1244, 104 S.Ct. 3518, 82 L.Ed.2d 826 (1984). *Guam's relation to the United States is entirely different.* Guam has no separate sovereign status; unlike CNMI, it "is subject to the plenary power of Congress and has no inherent right to govern itself." *Atalig*, 723 F.2d at 687; *see also* Leibowitz, 16 Va. J. Int'l L. at 62-63 ("authority of the Guam government depends entirely upon the will of Congress, and is at all times subject to such alterations as Congress may see fit to adopt"); *cf. Barusch v. Calvo*, 685 F.2d 1199, 1202 (9th Cir. 1982) (distinguishing CNMI from Guam with respect to border searches). . . .[221]

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[220] Commonwealth of the Northern Mariana Islands v. Atalig, 723 F.2d 682, 691 n.28 (9th Cir. 1984) (citation omitted) (emphasis added).

[221] Ngiraingas v. Sanchez, 858 F.2d 1368, 1371 n.1 (9th Cir. 1988) (emphasis added).

Finally, in the 1990 case upholding Section 805 of the Covenant, which prohibits alienation of land to persons not of "Northern Marianas descent," this appellate court wrote:

> It is undisputed that the Commonwealth [of the Northern Mariana Islands] is not an incorporated territory, *though the precise status of the Commonwealth is far from clear.* See [*Atalig*, 723 F.2d] at 691 and n.28.[222]

Because of this ambiguity, the arguments made by both the CNMI and the United States have some plausibility and should ultimately be worked out through political negotiations in light of the international law requirements discussed below,[223] and in light of the undisputed fact that the goal of the people of the Northern Marianas throughout this process has been to achieve greater self governance through the exercise of their right of self-determination.

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[222] Wabol v. Villacrusis, 898 F.2d 1381, 1390 n.18 (9th Cir. 1990).

[223] *See infra* notes 303-12 and accompanying text. One element of the political dispute worth noting involves the ocean resources adjacent to the CNMI. On April 12, 1990, the Special Representative of the President (Timothy Glidden) agreed to support the claim of the CNMI for full control of the resources in the 200-nautical-mile exclusive economic zone surrounding the CNMI. The proposal would also allow the CNMI, with the approval of and in cooperation with the United States, to participate in regional and international organizations which are concerned with international regulation of these rights and to negotiate treaties and other international agreements regarding the exercise of those rights. The language memorializing this agreement is as follows:

> The Special Representative of the President agrees to support the Commonwealth's proposal that the authority and jurisdiction of the Commonwealth of the Northern Mariana Islands be recognized and confirmed by the United States to include the sovereign right to ownership and jurisdiction of the waters and seabed surrounding the Northern Mariana Islands to the full extent permitted under international law. Under this proposal, the Commonwealth shall have the rights of a coastal state in the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf as provided in the United Nations Convention on the Law of the Sea; provided that the exercise of those rights shall be done in cooperation with the United States and subject to the responsibility and authority of the United States with respect to foreign affairs and defense under Section 104 of the Covenant.

The Special Representative of the President of the United States and the Special Representative of the Governor of the Commonwealth of the Northern Mariana Islands, Memorandum of Agreement on Ocean Rights and Resources (April 12, 1990).

When this agreement was distributed to the relevant federal agencies in Washington, however, a number of them—including the State Department—objected strongly to this "agreement." The status of this matter remains unresolved.

4. Guam

The legal status of Guam is also in a period of transition, and many of the issues dividing the CNMI and the United States are also being raised during Guam's attempt to attain the status of a "commonwealth." Guam became a possession of the United States in 1898 when it was ceded to the United States from Spain (along with Puerto Rico) in the Treaty of Paris.[224] Congress did not, however, legislate for the territory until it passed the Guam Organic Act in 1950.[225] Between 1898 and 1950, the political status of Guam remained "anomalous," with a military governor holding all legislative, executive, and judicial authority.[226]

In the 1980s, the Guamanians began pushing hard for a new political status, and they prepared and revised several times a draft "Guam Commonwealth Act"[227] expressing their views on a desired political relationship with the United States. Under this proposal, the powers of the United States as sovereign would be limited, in contrast to the present situation in which the federal government has essentially unlimited power because of Guam's status as an "unincorporated" territory.[228] Many of the articles of the draft Guam Commonwealth Act (GCA) delimit U.S. authority in specific ways, and Sections 103[229] and 202[230] provide a general restraint on U.S. action. These sections require "mutual consent" between the Commonwealth of Guam and the United States as to proposed modifications to the GCA and as to the

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[224] Treaty of Paris, Dec. 10, 1988, U.S.-Spain, 30 Stat. 1754 (1898).

[225] Act of Aug. 1, 1950, ch. 512, 64 Stat. 384 (1950) (codified at 48 U.S.C. §§ 1421-28 (1970)).

[226] Leibowitz, *Guam*, *supra* note 1, at 22 n.7 (quoting 25 Op. Att'y Gen. 292 (1904)).

[227] *See* H.R. 98, 101st Cong., 1st Sess. (1989).

[228] *Id.*

[229] *Id.* §103, "Mutual Consent," provides:

> In order to respect the self-government granted to the Commonwealth of Guam under this Act, the United States agrees to limit the exercise of its authority so that the provisions of this Act may be modified only with the mutual consent of the government of the United States and the government of the Commonwealth of Guam.

Id.

[230] *Id.* §202, "Effect of Federal Law," provides, "Except as otherwise intended by this act, no federal laws, rules or regulations passed after the date of this act shall apply to the Commonwealth of Guam unless mutually consented to by the United States and the government of the Commonwealth of Guam." *Id.*

applicability of federal laws, rules, or regulations passed after the date of the act.

Section 103 resembles Section 105 of the CNMI Covenant,[231] but the Guam proposal is broader. Under the CNMI Covenant, mutual consent is required only when fundamental provisions of the Covenant are to be modified. In contrast, Section 103 of the draft GCA requires mutual consent when *any* provision of the act is to be modified. No provision that resembles Section 202 of the draft GCA is in the CNMI Covenant. Sections 103 and 202, if adopted, would signal dramatic changes in the relationship between the United States and Guam.

The applicability of the U.S. Constitution and federal laws is governed by Articles 2 of the draft GCA. Section 201 says those provisions of the Constitution which now apply to Guam[232] would continue, unless specifically modified, and in addition the Tenth Amendment, the first sentence of the 14th Amendment, and Article IV, Section 2, Clause 2, and Section 4 would also apply.[233] The inclusion of the Tenth Amendment was intended to limit Congress's present power (pursuant to the Territory Clause) over Guam's internal affairs. The purpose of extending the first sentence of the 14th Amendment would be to foreclose the possibility of removing U.S. citizenship by federal law. The draft Guam Commonwealth Act thus would create a relationship between Guam and the United States substantially more autonomous than that of a state. Although some provisions of the act follow the CNMI model, several sections appear to create a relationship closer to a free association (i.e., the provisions granting Guam almost complete autonomy over internal affairs, requiring consultation with Guam over foreign affairs and defense matters affecting Guam; and requiring Congress to recognize the Chamorro people as the indigenous inhabitants of Guam and to foster the heritage of the Chamorro people).[234]

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[231] *See supra* note 197 and accompanying text.

[232] U.S. CONST art. I, § 9, cls. 2, 3; amends. I, IV, V (due process and double jeopardy), VI (rights to speedy trial and confrontation), XIII, XIV (second sentence of section 1), XV, XIX.

[233] H.R. 98, 101st Cong., 1st Sess. § 201 (1989).

[234] *Id.* §§ 102, 202, 302. A memorandum of understanding was, in fact, entered into between Guam and the United States Department of Defense and Interior in August 1990 agreeing to regular consultations on defense issues.

It is somewhat surprising that neither arts. 3 nor 10 of the GCA restrict land alienation the way § 805 of the CNMI Covenant does. Guam, like the Northern Mariana Islands, is small and land is scarce. Land plays a significant role in the

The United States has objected vigorously to many of the provisions in the draft Guam Commonwealth Act. A sixty-three-member task force consisting of officials from a range of federal agencies and chaired by Timothy W. Glidden was established in June 1988, and this group issued a long report about a year later.[235] The report is filled with detailed nit-picking concerning the draft Act and asserts that Guam should revise its Act to look more like the CNMI Covenant. Its tone and thrust are fundamentally unsympathetic to Guam's attainment of a truly autonomous status, and it seems to say that the only possible choice for a political community that is not a "state" is to be a "territory" subject to Congress's ultimate control under the Territory Clause.

Assistant Secretary of Interior for Territorial and International Affairs Stella Guerra testified on the Guam draft in Honolulu in December 1989 and said that her vision of a "Commonwealth" status is as follows:

> The term has come to mean an advanced form of political relationship with the United States, under which the people of the jurisdiction, in the exercise of their self-determination, draft and adopt a Constitution, compatible with the Constitution of the United States, creating local institutions of self-government. The United States, in turn, agrees to certain constraints on the exercise of federal authority.[236]

The constraints the United States is willing to accept are those it has accepted for the CNMI, namely "that those Constitutionally-created institutions of self-government shall not be unilaterally abrogated or amended by Congress."[237] But the United States will not agree to limit its ability to apply laws otherwise generally applicable to the states to

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culture and traditions of the Chamorros on Guam. Ownership of land is often equated with identity.

The Guam draft does have a type of local preference, however, in § 102(f)(i) which establishes a "Chamorro Land Trust for the benefit of the indigenous Chamorro people of Guam, and composed of certain lands returned by the United States . . . ."

[235] Federal Task Force Report on Guam's Commonwealth Act, *reprinted in* PACIFIC SUNDAY NEWS (Agana, Guam), Aug. 6, 1989, at 2D. This report was summarized and relied upon by Stella Guerra, Assistant Secretary for Territorial and International Affairs, Department of the Interior, in her testimony before the Subcommittee on Insular and International Affairs of the House Committee on Interior and Insular Affairs, on H.R. 98, the Guam Commonwealth Bill, Dec. 12, 1989, in Honolulu, Haw. [hereinafter *Guerra Testimony*].

[236] *Guerra Testimony*, *supra* note 235, at 6.

[237] *Id.*

its insular political communities *nor* its ability to enact particularized laws applicable to only one or to all of these islands:

> Except where the fundamental elements of self-government are concerned, we firmly believe that federal laws, in most instances, must apply to Guam as they would apply to the States and other U.S. jurisdictions. We also believe Congress' authority under the Territorial Clause should be retained not only because the Constitution specifically restricts application of the Tenth Amendment to States, but also because application of the Tenth Amendment to Guam would, in our view, be hurtful to Guam. We believe this to be true because it is the Territorial Clause that permits Guam to receive special and generous federal treatment and benefits unavailable to the States.[238]

In short, the United States apparently refuses to recognize the possibility of a "commonwealth" relationship in which the commonwealth would have any real elements of autonomy.[239] As this article is being published, serious negotiations are continuing between Guamanian officials and the U.S. government, but the major issues of disagreement remain to be resolved.

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[238] *Id.* at 8. *See infra* notes 312-40 and accompanying text (discussing the "special and generous federal treatment and benefits" Guam and the other territories and commonwealths receive).

[239] A related issue has been raised in recent cases addressing whether 28 U.S.C. § 1983 provides jurisdiction for lawsuits against the U.S.-flag islands. This venerable statute gives persons the right to sue other "persons" who deprive them of constitutional rights while acting under color of law. *Id.* Lower appellate courts have held that the CNMI (Fleming v. Dept. of Public Safety, 837 F.2d 401 (9th Cir. 1988)) and the U.S. Virgin Islands (Fretz v. Government of the Virgin Islands, 839 F.2d 968 (3d Cir. 1988)) were "persons" for this purpose and could be sued under § 1983, analogizing them to municipalities or local governmental entities. The United States Court of Appeals for the Ninth Circuit reached the opposite conclusion in the case of Guam, however, characterizing the Guam government as "a creation of Congress" and no more than "an instrumentality of the federal government." Ngiraingas v. Sanchez, 858 F.2d 1368, 1371-72 (9th Cir. 1988) (citing Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1286 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986)). This decision was affirmed by the United States Supreme Court in an opinion that does not discuss the islands in any detail, but says that the legislative history of § 1983 shows no Congressional intent to include "territories" in the concept of "persons" who could be sued under the statute. Ngiraingas v. Sanchez, 495 U.S. 182 (1990). Although the Ninth Circuit's *Ngiraingas* opinion had distinguished the CNMI from Guam, indicating that § 1983 could apply to one and not the other (858 F.2d at 1371 n.1 (reprinted in text *supra* at note 221)), the United States Supreme Court's decision attempts no such distinction. It would appear, therefore, that *Fretz* and probably *Fleming* have been overruled.

5. American Samoa.

The status issue has not been as controversial in recent years in American Samoa as it has been in Guam, the Northern Marianas, and Puerto Rico. Nonetheless, it should be noted that the relationship between the United States and American Samoa is also regulated by a type of contractual arrangement and that this contract should be seen to limit the power of Congress to pass legislation applicable to American Samoa.

During the final years of the Nineteenth Century, great interest was shown in the Samoan Islands by Germany, Great Britain, and the United States. From 1878 until 1889, the Samoan chiefs engaged in bitter struggles to determine who would become king.[240] All three of the outside powers were drawn into these disputes.[241] On March 5, 1889, one British, three German, and three U.S. warships were in Apia Bay. That night a horrendous hurricane wrecked six of the warships and killed 142 German and U.S. sailors.[242] The British ship was able to get under way without sustaining any damage.

The three nations met in Berlin in June 1889 to resolve the tensions that had arisen in Samoa and entered into a General Act.[243] Under its terms, Samoa would be an independent and neutral nation. Additionally, a new government for Samoa was established but it was to be controlled by Great Britain, Germany, and the United States, along with Samoa.[244]

During the next decade, the tensions between the three outside powers continued. In 1899, they decided that they would try one more time to resolve their differences.[245] On November 7, 1899, the United States, Germany, and Great Britain agreed to arbitrate their competing claims,[246] and a month later the three countries entered into a convention to divide Samoa into two nations:

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[240] R. Greer, The Government of American Samoa 9-10 (1958) (unpublished manuscript on file at the Hamilton Library, Univ. Haw.-Manoa).

[241] *Id.*

[242] *Id.* at 133.

[243] *See* Leibowitz, Defining Status, *supra* note 2 at 414.

[244] Greer, *supra* note 240 at 133.

[245] *Id.*

[246] Convention between the United States of America, Germany, and Great Britain, Relating to the Settlement of Certain Claims in Samoa by Arbitration, *done* Nov. 7, 1899, 31 Stat. 1987 (1898).

(1) Germany and Great Britain gave the United States all rights to Tutuila and other Samoan islands east of 171 degrees West Longitude.
(2) The United States granted Germany all rights to Upolu, Savai'i, and other Samoan islands west of 171 degrees West Longitude.
(3) The United States, Germany, and Great Britain were to have equal rights to trade in all of the Samoan Islands.[247]

Accepting the inevitable, the Samoan chiefs on Tutuila agreed to sign a deed of cession to the United States and did so on April 17, 1900. This document refers to the 1899 actions by the three outside powers stating that these governments "have on diverse occasions recognized the sovereignty of the government and people of Samoa and the Samoan group of islands as an independent state."[248] It then refers to "internal dissensions and civil war" as the reason why the three powers found it "necessary to assume control of the legislation and administration of the said State of Samoa."[249] The deed states that the signers cede to the United States the islands, rocks, reefs, foreshores, and waters "to erect the same into a separate District to be annexed to the said Government [the United States], to be known and designated as the District of 'Tutuila.'"[250] The deed further states that the chiefs "are desirous of granting" to the United States "full powers and authority to enact proper legislation for and to control the said islands,"[251] but also specifies that the United States shall respect the rights of the Samoans to their lands and property.[252] If the United States "shall require any land or any other thing for Government uses," it may take it on payment of a fair consideration.[253]

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[247] Convention between the United States of America, Germany, and Great Britain to Adjust Amicably the Question Between the Three Governments in Respect to the Samoan Group of Islands, *done* Dec. 2, 1899, 31 Stat. 1878, *reprinted in* AM. SAMOA CODE ANN. § 5 (1973).

[248] Cession of Tutuila and Aunuu, Apr. 17, 1990, Chief of Tutuila to U.S. Gov't, *reprinted in* AM. SAMOA CODE ANN. § 2 (1981); Arnold H. Leibowitz, *American Samoa: Decline of a Culture*, 10 CAL. WESTERN INT'L L.J. 220, 229-30 n.76 (1980). The Manua Islands were ceded in a separate document in July 1904, *reprinted in* AM. SAMOA CODE ANN. § 9-11 (1973). Swains Island became part of American Samoa by joint resolution of Congress, approved on March 4, 1925. H.R.J. Res. 244, 68th Cong., 2d Sess., 43 Stat. 1357 (1925).

[249] Treaty of Cession, *supra* note 248.

[250] *Id.* para. 1. The reference to the "waters" may give American Samoa special rights to the ocean resources in relation to the U.S. government.

[251] *Id.* preamble.

[252] *Id.* para. 2.

[253] *Id.*

The section of the Cession on local control reads as follows:

> The Chiefs of the towns will be entitled to retain their individual control of the separate towns, if that control is in accordance with the laws of the United States of America concerning Tutuila, and if not obstructive to the peace of the people and the advancement of civilization of the people, subject also to the supervision and instruction of the said Government. But the enactment of legislation and the general control shall remain firm with the United States of America.[234]

Congress did not formally accept this cession until 1929.[235]

Although providing modern meaning to decades-old agreements is always somewhat challenging, these events and documents codify a set of understandings that should guide U.S.-Samoa relations and act to restrain what Congress can do in the way of passing legislation applicable to American Samoa. The Deed of Cession establishes a trust responsibility on the part of the United States. It should be viewed in a manner similar to the way the 1840 Treaty of Waitangi[236] is now viewed in New Zealand.[237] The Treaty of Waitangi is the document in which the Maori chiefs acknowledged the British presence, but in this document they protected their rights to these lands and to self-governance. This Treaty is now viewed to be of constitutional importance, and the rights of the Maori as articulated in the treaty must be considered by the New Zealand government prior to any major decision.[238]

6. *The relationship between the U.S. Virgin Islands and the United States*

The United States bought St. Thomas, St. John, and St. Croix from Denmark in 1916, after two previous attempts to purchase these islands

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[234] *Id.* para. 3; *see generally* Tony Kaliss, The Legal and Political Relationship of the United States and American Samoa (spring 1990) (paper prepared for the Am. Studies Dept., Univ. Haw., Honolulu, Haw., spring 1990).

[235] 43 Stat. 1253 (Feb. 20, 1929) (codified at 48 U.S.C. § 1431).

[236] Treaty of Waitangi, Feb. 6, 1840, *reprinted in* PETER CLEAVE, THE SOVEREIGNTY GAME: POWER, KNOWLEDGE AND READING THE TREATY at 74-78 (1989).

[237] *See, e.g.*, REPORT OF THE WAITANGI TRIBUNAL ON THE MURIWHENUA FISHING CLAIM (1988); JANE KELSEY, A QUESTION OF HONOUR? LABOUR AND THE TREATY 1984-89 (1990).

[238] *See, e.g.*, New Zealand Maori Council and Latimer v. Attorney General and Others, 6 N.Z.A.R. 353 (Ct. App. 1987).

7. An "enhanced" commonwealth

Are there alternatives that could be pursued by the U.S.-flag islands other than their present status of being at the mercy of the federal government? One possibility that is being developed in the discussions now underway with Puerto Rico is an "enhanced" commonwealth status. Numerous attempts have been made to describe what an "enhanced commonwealth" is. Some of the ideas that have been developed during the 1989-1990 congressional deliberations are of interest to this discussion, and the following description of two approaches are offered to illustrate that additional options and models are available. One of the 1989 Senate proposals[285] began with the following policy statement:

> The policy of the United States shall be to enhance the Commonwealth relationship enjoyed by the Commonwealth of Puerto Rico and the United States to enable the People of Puerto Rico to accelerate their economic and social development and attain maximum cultural and political autonomy within permanent union with the United States, to secure more equitable participation for the People of the Commonwealth of Puerto Rico in all Federal programs that provide grants or services to citizens of the United States as individuals, to secure increased participation by the People of Puerto Rico in United States governmental decisions affecting them, to safeguard the distinct cultural identity of the People of Puerto Rico, and to protect the bilateral nature of the relationship between the Commonwealth of Puerto Rico and the United States.[286]

The next subpart stated that a federal law would be applicable to Puerto Rico only if it is consistent with this purpose statement, and "has the proper regard for the economic, cultural, ecological, geographic, demographic and other local conditions" of Puerto Rico.[287] These requirements can be ignored only if the law concerns grants to individuals directly, or federal citizenship, or foreign affairs/national security, or if Congress "makes a specific finding that there is an

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[284] *Richards*, 673 F. Supp. at 158.
[285] *See* S. REP. No. 120, 101st Cong., 1st Sess. (1989).
[286] *Id.* at 44-45.
[287] *Id.* at 45.

overriding national interest that such law should apply to" Puerto Rico.[288]

This proposal also contained a provision stating that the Governor of Puerto Rico could certify that any given federal law was inconsistent with the Commonwealth policy statement or Puerto Rican law.[289] After such certification, unless Congress specifically acted within sixty days to require that this law must apply to Puerto Rico, it would no longer apply.[290] Finally, under this proposal, all federal agencies would be required to justify any major action taken that affects Puerto Rico in terms of its consistency with the Commonwealth policy statement.[291] This approach strikes a compromise between the positions of the draft Guam Commonwealth Act[292] and the position of the federal task force that criticized it[293] and could be useful in promoting autonomy within the larger political union.

In August 1990, several committees in the Senate reached a consensus on the meaning of "enhanced commonwealth" that was somewhat more vague that the 1989 proposal described above, but which would nonetheless have answered many questions regarding this status.[294] This Senate proposal[295] would have allowed Puerto Rico to seek exemption

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[288] *Id.* at 45-46.

[289] *Id.* at 46.

[290] *Id.*

[291] *Id.* at 47-48.

[292] *See supra* notes 227-34 and accompanying text.

[293] *See supra* notes 235-39 and accompanying text.

[294] The Senate bill was marked up as a substitute to H.R. 4765. The House version left the details of the "enhanced commonwealth" status purposefully vague and anticipated negotiations on the details between Puerto Rico and Congress should that option be chosen. The Senate felt that the voters should understand what the option entails before they are asked whether they prefer it over the statehood and independence possibilities. *See, e.g.*, Editorial, *The House Version*, SAN JUAN STAR, Aug. 4, 1990, at 19.

[295] The Senate language to be incorporated into H.R. 4765 was as follows:

(3) A new commonwealth relationship.

(A) The new Commonwealth of Puerto Rico would be joined in a union with the United States that would be permanent and the relationship could only be altered by mutual consent. Under a compact, the Commonwealth would be an autonomous body politic with its own character and culture, not incorporated into the United States, and sovereign over matters governed by the Constitution of Puerto Rico, consistent with the Constitution of the United States.

(B) The United States citizenship of persons born in Puerto Rico would be guaranteed and secured as provided by the Fifth Amendment of the

from federal laws and authority to enter into international agreements, which would be considered by the President and Congress on an expedited basis.[296] Puerto Rico residents would participate in federal social programs "equally with residents of the several States contingent on equitable contributions from Puerto Rico."[297] Congress would still have had some ability to control Puerto Rico, but it would have been more explicitly recognized that Puerto Rico was "an autonomous body politic" and that the relationship between Puerto Rico and the United States "could only be altered by mutual consent."[298]

8. Territorial nullification

Another option is to give the legislature of the insular political community the power to nullify or amend some of the federal laws

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Constitution of the United States and equal to that of citizens born in the several states. The individual rights, privileges, and immunities provided for by the Constitution of the United States would apply to residents of Puerto Rico. Residents of Puerto Rico would be entitled to receive benefits under Federal social programs equally with residents of the several States contingent on equitable contributions from Puerto Rico as provided by law.

(C) To enable Puerto Rico to govern matters necessary to its economic, social, and cultural development under its constitution, the Commonwealth would be authorized to submit proposals for the entry of Puerto Rico into international agreements or the exemption of Puerto Rico from specific Federal laws or provisions thereof to the United States. The President and the Congress, as appropriate, would consider whether such proposals would be consistent with the vital national interests of the United States on an expedited basis through special procedures to be provided by law. The Commonwealth would assume any expenses related to increased responsibilities resulting from the approval of these proposals.

Id.

[296] *Id.* para. 3(c).

[297] *Id.* para. (3)(B). The "Summary of Senate Finance Committee Staff Options on S. 712" included the following description of the financial implications of the Enhanced Commonwealth Status:

Supplemental Security Income, Aid to Families with Dependent Children, Medicaid phased-in over five year period at 100% national levels with 50% federal/50% local funding or reduced levels. (Agriculture Committee expected to extend Food Stamps.) New benefits paid for by: eliminating rebate of rum excise taxes and customs duties; excise taxes on U.S. products shipped to P.R.; curtailing § 936 tax credit; and floor amendment to raise revenues necessary because of Food Stamps. Except Finance issues from fast-track procedures for Congress' reconsideration of application of federal laws at P.R.'s request.

Id.

[298] *See id.* para. 3(A) (quoted *supra* note 295).

that otherwise would apply. This approach was used in Alaska beginning in 1912. The relevant laws are provided in full below because they illustrate that this approach is workable:

> Section 23. Constitution and laws of the United States extended.
> The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States. All the laws of the United States passed prior to August 24, 1912, establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; except as herein provided all laws in force in Alaska prior to that date shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature [of the Territory of Alaska].
> Section 24. Authority of Territorial legislature to repeal or amend existing laws limited; additional taxes or licenses.
> The authority granted to the legislature by section 23 of this title to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to sections 41, 47, 161-169, and 322-325, of this title. This provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses.[239]

9. *Free association*

The "free association" option which has been chosen by the Federated States of Micronesia and the Republic of the Marshall Islands is another possibility. These islands have complete autonomy over local affairs but coordinate their foreign relations with the United States and rely on the United States for military protection. As "freely associated states," they are now thought of as sovereign and are joining regional and international organizations as independent nations. U.S. laws do not apply to them, although some U.S. rules must be complied with contractually if they accept U.S. funds.

The concept of "free association" is not one that arose under the provisions of the Constitution; it finds its legitimacy from the United

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[239] Act of Aug. 24, 1912, 37 Stat. 512 (1912) (codified at 48 U.S.C. §§ 23-24 (1946)).

Nations. U.N. General Assembly Resolution 1541 enacted in December 1960 establishes the principles that were to be utilized in determining when those entities that were governed by other countries had reached a self-governing status and thus were no longer "colonies."[300]

"Free association" is defined in Resolution 1541 as an association between two entities that is "the result of a free and voluntary choice . . . through informed and democratic processes."[301] In a relationship of free association, there must be respect for the individuality and the cultural characteristics of the area and its people. The most essential element is that the people of each of the freely associated states must unilaterally have "the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes." Finally, the people have the right to develop their own constitution without any outside inference.[302]

In addition to the Federated States of Micronesia and the Republic of the Marshall Islands, other examples of free associated states are the Faroe Islands (Denmark), the Cook Islands (New Zealand), Niue (New Zealand), and the Netherland Antilles (the Netherlands).

C. *The Role of International Law*

The international law principles that govern nonself-governing territories are relevant in evaluating whether the types of controls the federal government imposes on the U.S.-flag islands are lawful. The U.S. position with regard to the Commonwealth of the Northern Mariana Islands, for instance, has been that the people of the Northern Marianas exercised their power of self determination to become a territory of the United States.[303] The requirements of Article 73 of the United Nations Charter[304] and of U.N. General Assembly Resolution

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[300] G.A. Res. 1541 (xv), 15 U.N. GAOR, 25th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960).

[301] *Id.*

[302] *See generally* DONALD MCHENRY, MICRONESIA: TRUST BETRAYED 37 (1975).

[303] *See supra* note 215 and accompanying text.

[304] U.N. CHARTER art. 73 requires countries that administer "territories whose peoples have not yet attained a full measure of self-government" to take measures that promote "the well-being of the inhabitants of these territories," and in particular "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions . . . ." *Id.*

1541,[305] would not be complied with, however, unless the status adopted by the people of the Northern Marianas allows them to participate in the political life of the nation in a nondiscriminatory basis.[306] The residents of the Northern Marianas do not now vote for the President nor do they have a voting representative in Congress. Congress can pass laws binding on them without their consent. They are not therefore truly self-governing. Even if it could be established that the residents of the Marianas knowingly sought this subservient status,[307] it would not comply with the requirements of international law, just as a contract in which a person agrees to become a slave of another would not be enforced in a domestic court. Only if a people truly have the right to enact the laws that apply to them can it be said that they are self-governing.

The political leaders of the CNMI have tried to convey their concerns to the United Nations but have been told by U.S. officials not to do so.[308] Because the CNMI was part of a trust established by the United Nations, the United Nations maintained a strong role in determining whether the United States has complied with the trust. In December 1990, the Security Council terminated the trust (except for Palau), despite the efforts by the Governor of the CNMI to delay this decision.[309]

Various bodies in the United Nations have taken an active interest in Puerto Rico's status during the past half century,[310] and U.N. missions visited the Virgin Islands and Guam in the late 1970s.[311] Because none of the five U.S.-flag island communities are now fully

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[305] *See supra* note 300 and accompanying text.

[306] *See, e.g.*, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (xxv) (*adopted* Oct. 24, 1970), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc A/8028 (1970) (stating that having "a government representing the whole people belonging to a territory" is an essential component of self-determination).

[307] The United States has argued that the residents of the Northern Marianas sought their present status knowing that they would be subject to the exercise of Congressional power under the Territory Clause. *See* U.S. Brief, *supra* note 204, at 10-12 nn.8, 9, United States *ex rel.* Richards v. Sablan, No. 89-16404 (9th Cir. Mar. 1990).

[308] *See, e.g.*, Dan Phillips, *U.S. Tells CNMI to Stay Away from U.N. Meeting*, THE TRIBUNE (Saipan), May 17, 1990.

[309] S.C. Res. 683 (Dec. 22, 1990).

[310] *See* LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 228-31.

[311] *Id.* at 231.

self-governing, it would appear that the United States is not fulfilling its obligations under the U.N. Charter and international law. The U.S. response has been that each of these islands has a political status that it has freely adopted, and thus that each has exercised its right of self-determination. The substantial recent unhappiness regarding the relationship with the United States expressed particularly in Guam and the Northern Marianas[312] would appear to undercut the U.S. position.

IV. The Practical Economic Consequences

The preceding discussion shows that the five U.S.-flag insular political communities are not "self-governing" or "autonomous" in the true sense of those words. Congress can pass legislation applicable to them, either through laws that apply throughout the nation or through laws specifically written for one or more island community. Because the islanders have no effective voting representation in Congress[313] and do not vote for the President, they have only limited ability to influence legislation that affects them. In addition, federal agencies have discretion to apply and implement federal laws in the islands, and again the islanders have only limited input about how these laws are will be interpreted and applied to their situations.

Has this state of affairs in fact hurt the islanders? The federal influence has been largely benign, except perhaps for the military bases in Guam, and some statutes and regulations do favor the islanders over residents of the states. Other federal programs do not provide benefits for the islanders or provide them with only a fraction of the benefits received by residents of the states. The greatest annoyance is perhaps that the federal laws and regulations seem frequently to be enacted and applied without concern for or consideration of the special situations in the islands. It is the inability to have direct input into federal decisions through the influence of a voting member of Congress that is most frustrating.

A. Customs

American Samoa, Guam, the Northern Marianas, and the United States Virgin Islands are all now outside the U.S. customs union,[314]

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[312] *See supra* notes 194-239 and accompanying text.

[313] *See supra* notes 119-33 and accompanying text.

[314] 48 U.S.C. § 1421(h) (1976); 19 C.F.R. § 718 n.5; CNMI Covenant, *supra* note 23, § 603(a); *see* Leibowitz, Defining Status, *supra* note 2, at 303, 382, 469, 569-70. Puerto Rico is in the U.S. customs union. *Id.* at 203, 218.

which means articles can be imported without duty to their shores. If these same items are then shipped to a U.S. state, duty must be paid. No duty needs to be paid on any items, however, if either thirty percent or fifty percent (depending on the product and island) of their value has been added in the U.S.-flag island and the items are substantially different from items brought into the island.[315]

This scheme has been somewhat helpful in promoting the development of local manufacturing in Guam, the Marianas, and the Virgin Islands,[316] but Congress has been watchful to ensure that this development does not compete with stateside industries,[317] and quotas have been imposed upon imports of watches and textiles.[318] American Samoa has been able to take advantage of these statutes only through its two tuna canneries; an effort was made in the 1970s to promote a jewelry industry, and the American Samoan government is now considering a textile operation.[319] Under the regime proposed in Guam's draft Commonwealth Act, Guam would remain outside the U.S. customs union (meaning goods would enter without duty as at present), but the percentage of value required to be added for products to be exported to the U.S. states without duty would be lowered from fifty to thirty percent.[320]

B. Immigration

American Samoa,[321] and the Northern Marianas[322] are authorized to control the immigration in and out of their islands, but Guam, Puerto Rico, and the Virgin Islands are not.[323] This issue has been a major cause for concern in Guam during the past two decades,[324] and under the draft Guam Commonwealth Act the authority to control immigration into Guam would shift from the United States to the Commonwealth of Guam.[325]

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[315] Pursuant to Headnote 3(a) of the U.S. Tariff Code. *See* LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 303-04, 383, 469-70, 569-70.

[316] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 304-06, 383-84, and 570-72.

[317] *Id.* at 306, 383-84, 571-72.

[318] *Id.* at 383-84.

[319] *See id.* at 469-70.

[320] Guam Commonwealth Act, *supra* note 227, § 501.

[321] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 447-51.

[322] *Id.* at 558-62.

[323] *Id.* at 161-62, 278-84, 387-92.

[324] *Id.* at 388.

[325] Guam Commonwealth Act, *supra* note 227, art. 7.

C. Taxation

None of the residents of the five insular political communities pay taxes to the United States Treasury.[326] American Samoa, Guam, the Northern Marianas, and the U.S. Virgin Islands have "mirror image" taxes whereby residents pay to their local government what they would have paid to the United States had U.S. tax law applied.[327] Puerto Rico taxes its citizens at rates far higher than any state and, at certain levels of income, far more than federal rates.[328]

D. Other Federal Laws

The application of other federal laws to the insular communities is a patchwork of ad hoc decisions. The U.S. shipping laws requiring the use of U.S.-flag vessels to transport passengers and cargo between any two points in the United States applies to Guam and Puerto Rico, but not to American Samoa or the Virgin Islands, or to the Northern Marianas (except for activities of the U.S. government and its contractors).[329] American Samoa, Guam, and the Northern Marianas are exempt from the Nicholson Act[330] prohibiting the landing of fish in U.S. ports by foreign vessels, and the Virgin Islands are exempt for landings by vessels of less than fifty feet in length.[331] The minimum wage laws applicable in the states are currently mandatory in Guam, Puerto Rico, and the United States Virgin Islands, but not in American Samoa and the Northern Marianas where lower minimums are permitted.[332] Social welfare programs are applied erratically in the islands,

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[326] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 203-14, 288-95, 376-82, 466-68, 565-69.

[327] *Id.*

[328] Helfeld, *supra* note 146, at 455 and n.8.

[329] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 310, 395 (citing 46 U.S.C. §§ 13, 289, 292, 316, 808, 877, 883, 883-1, and § 502(b) of the CNMI Covenant, *supra* note 23)). Article 9 of the draft Guam Commonwealth Act, *supra* note 227, would provide a limited exception for Guam from the coastwise shipping laws.

[330] Nicholson Act, Pub. L. No. 87-220, 75 Stat. 493 (1961) (codified at 46 U.S.C. § 251(a)).

[331] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 470 and n.300.

[332] *Id.* at 216, 386, 468-69. The U.S. Department of Labor reviews the minimum wage rates in American Samoa every two years. Under § 802 of the draft Guam Commonwealth Act, *supra* note 227, the power to enact and enforce labor laws would be transferred from the U.S. Congress to Guam.

with most programs providing lower benefits or no eligibility at all.[333]

E. Third-Country Assistance

The Commonwealth of the Northern Marianas has been particularly eager to receive monetary aid from Japan for a control tower at its airport and a new sewage system, but the United States State Department has stated repeatedly that because the CNMI is part of the United States it is not entitled to receive development assistance from any foreign nation.[334] This position is based on the State Department's view that development assistance should go only to the world's poorest countries and that "subdivisions of the United States, be they states, commonwealths, or territories, may not enter into international agreements with foreign governments, such as generally are required for the provision of development assistance."[335] Governor Lorenzo I. De Leon Guerrero responded with great disappointment at this position, arguing that it raises the question whether "we made the wrong decision in 1975 when we agreed to enter into political union with the United States,"[336] since the other Micronesian entities can receive assistance from Japan. Governor Guerrero also argued that it was appropriate for Japan to assist with Saipan's air control tower because eighty percent of the 300,000 passengers landing at the airport are Japanese.[337]

The United States Interior Department's Office of Territorial and International Affairs has also appealed to the State Department for

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[333] *Id.* at 223-24, 384-85, 474-76, 575-76; Helfeld, *supra* note 146, at 460 and n.42. This discriminatory treatment has been upheld regarding Puerto Rico in Califano v. Torres, 435 U.S. 1 (1978), and Harris v. Rosario, 446 U.S. 652 (1980). *See supra* notes 173-77 and accompanying text.

[334] *See, e.g.*, Letter from Marilyn A. Meyers, Deputy Assistant Secretary of State for East Asian and Pacific Affairs, to Stella Guerra, Assistant Secretary of Interior for Territorial and International Affairs (Mar. 30, 1990); Letter from Marilyn A. Meyers to Lorenzo I. De Leon Guerrero, Governor of CNMI (June 5, 1990); Letter from Janet G. Mullins, Assistant Secretary of State for Legislative Affairs to Representative Ron de Lugo, Chair of the U.S. House Subcommittee on Insular and International Affairs (July 31, 1990).

[335] *Id.*

[336] Dana Williams, *Guerrero: CNMI Punished*, PACIFIC DAILY NEWS (Agana, Guam), Aug. 17, 1990, at 1.

[337] *Id.*

greater flexibility on this question,[338] as has Timothy Glidden, President Bush's Special Representative to the status negotiations with the Northern Marianas Government.[339] Members of Congress are also seeking some compromise on this issue.[340]

F. Summary

The island communities have benefitted from special treatment under some U.S. laws, but they have felt frustrated that the exceptions seem to be manipulated to protect stateside interests rather than with a clear view of promoting the interests of the islanders. Under U.S. law, it is clear that special ad hoc preferences can be provided to the islanders, but politically the islanders have limited input into which preferences

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[338] Letter of Stella Guerra, Assistant Secretary of Interior for Territorial and International Affairs to Marilyn A. Meyers, Deputy Assistant Secretary of State for East Asian and Pacific Affairs (Apr. 5, 1990). This letter contains the following language:

> First, U.S. territories cannot be regarded as states. They are distant from mainland U.S.A. They are geographically part of areas considered by U.S. policy makers as being foreign. They are closer geographically to foreign independent island nations and territorial areas administered by foreign nations; thus, they are subject to international and foreign regional influences unknown to the 50 states. And from a resource perspective, they cannot in any way be likened to the States. They are unique and must be regarded as *unlike* the States.
>
> At Interior we have acknowledged, and we ask the State Department to acknowledge, there always will be infrastructure and other requirements in U.S. territories unfulfillable by the United States and more favorably fillable by foreign assistance because of the unique circumstances of the insular areas. Any decision to accept foreign assistance would be based on the conditions attached by the profferer and the intended objective.
>
> What I am asking is reconsideration, in the context set forth above, of the U.S. policy set forth in your letter of March 30. Radical shifts I am not seeking; only sufficient flexibility to enable us to be carefully responsive to the needs of U.S. territories.
>
> If the State Department reconsiders U.S. policy on the foreign assistance issue, I have confidence the policy could be tailored to fit the unique circumstances of U.S. insular areas. May I point out that § 302(b) of P.L. 99-239 recognized modification of federal laws and regulations may sometimes be necessary for their application to U.S. insular areas.

Id.

[339] Dave Hughes, *Guerrero to State: 'Did We Make Mistake?'* MARIANAS VARIETY NEWS & VIEWS (Saipan), Aug. 17, 1990, at 26.

[340] Charles Wilbanks, *State Dept. Opposes CNMI Request for Foreign Aid*, PACIFIC DAILY NEWS (Agana, Guam), July 13, 1990.

they will be favored with. Ultimately, they are entitled to greater control over the laws that apply to them.[361]

V. Summary and Conclusion

The United States has always governed its territories and possessions separately from its states. During the past two centuries, the legal regime applicable to the territories has evolved in a patchwork ad hoc fashion, with Congress responding to the unique and individual needs of each territory, sometimes with sensitivity and sometimes with indifference or insensitivity. Executive agencies responsible for the territories have also responded in inconsistent ways to the needs of the territories, sometimes recognizing their particular needs and applying federal statutes in appropriate ways and sometimes refusing to respond to the pleas of the territories for individualized treatment.

Five island communities are currently under U.S. sovereignty but are not states: American Samoa, Guam, CNMI, the Commonwealth of Puerto Rico, and the United States Virgin Islands. What are the rights and privileges of the residents of these islands under the Constitution and international law? Which provisions of the Constitution apply in these islands? Is Congress at liberty to pass any legislation whatsoever under the Territory Clause of the Constitution and impose that law on the people of these islands? In the cases of Puerto Rico and the Northern Mariana Islands, explicit contractual relationships have been developed through Puerto Rico's compact in the early 1950s

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[361] The U.S. Congress recognized that the applicability of U.S. statutes and regulations to the U.S.-flag islands needs reevaluation in 1986 when it approved the Compacts of Free Associations with the Federated States of Micronesia and the Republic of the Marshall Islands. Pub. L. No. 99-239, § 302(b), 97 Stat. 1770 (1986) (codified at 48 U.S.C. § 1681). In the statute approving the compacts, Congress asked the Department of the Interior, working with the Department of State, to prepare a report setting forth clearly defined policies regarding United States, and United States associated, noncontiguous Pacific areas, including:

> (1) the role of and impacts on the noncontiguous Pacific areas in the formulation and conduct of foreign policy;
>
> (2) the applicability of standards contained in Federal laws, regulations, and programs to the noncontiguous Pacific areas and any modifications which may be necessary to achieve the intent of such laws, regulations, and programs consistent with the unique character of the noncontiguous Pacific areas . . . .

Id.

and the Northern Marianas' Covenant in 1975.[342] Do these documents limit what Congress can do, or are they to be viewed as just another statute that Congress can later amend? Should Guam be able to become a commonwealth, too, as its citizens wish, and, if so, can that status be one in which Guam would have meaningful autonomy from the U.S. government?[343] What relationships should ultimately be developed for American Samoa and the U.S. Virgin Islands?[344] Should some, or all, of these islands become states?

In a series of 1901 decisions referred to as the *Insular Cases*,[345] the Court developed the idea that some U.S. territories are not formally "incorporated" into the United States and that the United States Constitution does not fully apply in these areas. Territories are "incorporated" according to this doctrine if they are destined to become states, and ultimately it is up to Congress to decide which territories achieve this status. In a series of related decisions, the Supreme Court concluded that Congress had broad power to pass legislation that would be binding on the territories, although Congress could not violate fundamental constitutional rights and natural law principles in this process.[346] A number of cases, for instance, examined whether residents of the territories were entitled to jury trials, and most concluded that they were not.[347] More recently, the United States Supreme Court ruled that Puerto Rico could not discriminate against aliens with regard to professional licensing,[348] but the United States Court of Appeals for the Ninth Circuit concluded that the CNMI could discriminate against persons who are not "of Northern Marianas descent" with regard to the ability to purchase land.[349] The Governor of Guam has argued that the constitutional right to privacy does not apply there when trying to defend a Guam statute restricting access to abortion, but the federal district court has rejected this argument.[350] In the context of federal social welfare programs, the Court has concluded that Congress can discriminate against residents of the territories and provide them with

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[342] *See supra* notes 147-223 and accompanying text.
[343] *See supra* notes 224-39 and accompanying text.
[344] *See supra* notes 240-84 and accompanying text.
[345] *See supra* notes 40-59 and accompanying text.
[346] *See supra* notes 50-90 and accompanying text.
[347] *See supra* notes 64-86 and accompanying text.
[348] *See supra* notes 87-90 and accompanying text.
[349] *See supra* notes 95-111 and accompanying text.
[350] *See supra* notes 91-94 and accompanying text.

fewer services.[331] These cases form an inconsistent pattern and many questions remain unresolved regarding the power of Congress and the constitutional rights that apply in the islands.

A similarly inconsistent pattern is found by examining the federal statutes and regulations that apply to the islands. American Samoa, Guam, the CNMI, and the United States Virgin Islands are outside the U.S. customs union, but Puerto Rico is in it.[332] Goods of any sort from any place in the world can be imported into the four communities outside the customs union without any obligation to pay U.S. duties or taxes on them. If these imported goods are then exported to other locations in the United States, U.S. customs duties must be paid on them unless the items have been transformed into something substantially different on the U.S.-flag island and either thiry or fifty percent (depending on the product and island) of their value has been added through this transformation. This status has provided some economic benefits for some of these island communities. It is, however, a relationship that is subject to alteration by Congress, which has established quotas on certain goods when mainland industries seemed threatened by the economic activities in the islands, and by the decisions of federal agencies acting on their own, without any lead from Congress.

Other legal arrangements also seem to form no clear pattern. Two of these island communities control their own immigration (American Samoa and the CNMI), three do not.[333] U.S. coastwise shipping laws apply in two (Guam and Puerto Rico), but not in the other three.[334] Minimum wage laws apply in some, but not others.[335] And so on.

In practical financial terms, the islands have received some economic benefits from their association with the United States, but these benefits have been erratic and unpredictable. This puzzling set of statutes and regulations surely exist in large part because the islands have only limited abilities to affect decisions made in Washington.

None of these islands now have full and effective voting representation in Congress and their residents do not vote for the President.[336] Each island community elects either a Delegate (American Samoa, Guam, and the United States Virgin Islands), a Resident Commissioner

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[331] *See supra* notes 173-77 and accompanying text.
[332] *See supra* notes 314-20 and accompanying text.
[333] *See supra* notes 321-25 and accompanying text.
[334] *See supra* note 329 and accompanying text.
[335] *See supra* note 332 and accompanying text.
[336] *See supra* notes 119-33 and accompanying text.

(Puerto Rico), or a Resident Representative (CNMI) to Washington. The Delegates and the Commissioner are located at the House of Representatives; they can introduce bills and vote in committees, but have no vote when the House meets in plenary session to consider whether to enact a bill or approve a budget. They cannot effectively form coalitions or bargain with their vote for the benefit of the islands. The CNMI Resident Representative has no rights or privileges in Congress, except the same right to present testimony that any person has. If Congress can impose legislation on the islands when the islanders have no effective representation in that legislative body, then these islands are not self-governing in any meaningful sense. Even though they have local legislatures, their enactments can be overturned by Congress.

In the early 1950s, Puerto Rico negotiated a compact with the United States that led to the "Commonwealth of Puerto Rico."[357] This new status was meant to provide more autonomy for Puerto Rico, and in several judicial opinions in the late 1950s and 1960s, federal judges wrote that Puerto Rico's compact provided protection to Puerto Rico and that it could not be unilaterally altered by Congress.[358] In the late 1970s and early 1980s, however, the United States Supreme Court upheld Congressional statutes that explicitly discriminated against Puerto Rico, apparently feeling that Congress can treat Puerto Rico as it wishes under the Territory Clause.[359] Because of these conflicting views, Congress and the people of Puerto Rico have been reexamining Puerto Rico's status, looking again at the options of statehood, independence, and an "enhanced" commonwealth status.

The Commonwealth of the Northern Mariana Islands was established in 1975 by virtue of a negotiated Covenant that was approved by the voters of the Northern Marianas and the United States Congress.[360] The CNMI government has viewed this Covenant as limiting Congress's power to pass legislation affecting it, but the U.S. government has argued that Congress still has broad powers to legislate under the Territory Clause. According to the U.S. view, expressed recently in a long legal brief,[361] the Covenant is just an ordinary statute which

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[357] *See supra* notes 147-89 and accompanying text.

[358] *See, e.g., supra* notes 169-71, 178-83 and accompanying text.

[359] Harris v. Rosario, 446 U.S. 652 (1980); *see supra* notes 175-77 and accompanying text.

[360] *See supra* notes 192-223 and accompanying text.

[361] *See supra* notes 204-17 and accompanying text.

Congress can unilaterally amend pursuant to the Territory Clause, except for the few provisions specifically requiring mutual amendment that are listed in Section 105 of the Covenant.[362]

The United States argues that the people of the Northern Marianas exercised their right to self-determination in 1975 by voting to be affiliated in permanent union with the United States in a status in which Congress can impose laws upon them under the Territory Clause, without their consent or meaningful representation in the legislative process. If the historical facts support such a conclusion, is that relationship acceptable under international law?[363]

The Territory of Guam has been seeking to become the "Commonwealth of Guam" and has drafted and revised a Guam Commonwealth Act during the past several years.[364] A task force of federal officials has issued a long analysis of this Act sharply criticizing its attempts to establish a degree of real autonomy for the island.[365]

The negative responses of U.S. officials to the CNMI claims that its Covenant provides it with a degree of autonomy and to Guam's attempt to obtain more autonomy through its Commonwealth Act indicate that the executive branch of the United States is not yet willing to acknowledge that a status can exist between being a "state" and being a "territory."[366]

Members of Congress have, however, been more flexible on this subject. In the current discussions on Puerto Rico's status, the option of becoming an "enhanced commonwealth" has been developed,[367] and it is clear that this option would provide more autonomy to this island community. Several versions have been proposed, but all include some mechanism whereby Puerto Ricans could play an active role in determining which federal laws will apply to them. These new alternatives provide useful options that should be examined by the Pacific U.S.-flag islands as well.

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[362] CNMI Covenant, *supra* note 23, § 105; *see supra* note 197.

[363] *See supra* notes 303-12 and accompanying text.

[364] *See supra* notes 224-39 and accompanying text.

[365] *See supra* note 235 and accompanying text.

[366] *See, e.g.*, statements of Tim Glidden, *supra* note 217, and Stella Guerra, *supra* notes 236-39 and accompanying text; US Brief, *supra* note 204, at 10 n.8; *supra* notes 212-13 and accompanying text.

[367] *See supra* notes 285-98 and accompanying text.

International law is relevant to this analysis, because the international community now prohibits the maintenance of colonies.[368] All peoples are entitled to self-determination. As mentioned above, the residents of these islands do not have full and effective representation in the United States Congress or the right to vote for the President of the United States. If they do not have a meaningful say in deciding what laws apply to them, then their status is akin to that of subjects in a classic colonial situation.

These islands deserve the dignity of a more carefully defined autonomous status. The position of U.S. officials that the U.S. system can envision only two types of political entities—"states" and "territories"—is untenable. Our political system can certainly also include a true "commonwealth," in which the island residents can have direct input into the federal laws that apply to them and in which their decisions that certain laws should not apply would be respected unless Congress identifies an overriding national necessity to have a uniform law on the subject. Two models outlining this approach taken from the Puerto Rico bills now under consideration in Congress are described above.[369]

Without this degree of autonomy, these communities must have representation in Washington. If they have neither autonomy nor representation, they cannot be described as "self-governing" and then their colonial status must be seen as a violation of international law.[370] Arnold H. Leibowitz argues that the islands should have the option of statehood,[371] and Puerto Ricans are again looking closely at this possibility. If some of the other islands are thought to have too few residents to qualify as a state, they could be given some new arrangement, such as a voting Representative in the House, or one Senator and one Representative. Surely lawyers could adapt our Constitution to absorb such an idea if it were thought to be a wise one. Some mechanism also should be devised to allow the islanders to participate in presidential elections.

The present situation in which the islands are at the mercy of Congress and a federal bureaucracy that can be erratic, inconsistent, and insensitive cannot be allowed to exist indefinitely. The uncertainties

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[368] *See supra* notes 303-12 and accompanying text.

[369] *See supra* notes 285-98 and accompanying text.

[370] *See supra* notes 303-12 and accompanying text.

[371] LEIBOWITZ, DEFINING STATUS, *supra* note 2, at 69-83.

created by this situation thwart development and discourage initiatives in the islands.

Each of these island communities have demonstrated the ability to exercise local self government. They each have a mature and lively political structure in which the basic values of fairness and full opportunities for participation are maintained at the local level. They each have unique cultures that should be allowed to develop in ways that are true to their traditions. In terms of their subservience to the Congress and the federal agencies, however, they are still colonies.

The present ambiguous situation requires attention and new solutions. International law does not permit a perpetuation of colonial servitude, nor does that status comport with the traditions of fair play and justice that have marked our nation's heritage. Our nation should either recognize the legitimacy of a real or "enhanced" commonwealth status giving these islands true control over their affairs or we should give them meaningful voting representation in Washington.

ADDENDUM

On December 8, 1992, the Democratic Caucus of the House of Representatives voted to authorize the delegates representing American Samoa, Guam, Puerto Rico, and the United States Virgin Islands (and the District of Columbia) to vote on amendments to bills on the House floor and virtually all other matters relating to legislation except final passage.[372] The delegates were pleased by this step,[373] but it was seen as a partisan move by the Repulicans who immediately denounced it.[374] The House Republican leader, Robert H. Michel, directed his staffto assemble a team of lawyers to challenge the constitutionality of this move in the courts.[375]

Although this rule change—if it stands—is a positive step in recognizing the right of the U.S.-flag islands to either a more significant voice in national decision making or more autonomy, it is insufficient to address the concerns raised in the preceding article. The islands need to have a new status that is recognized as permanent in nature, not one that can be changed with each shift in the winds of political power.

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[372] Clifford Krauss, *House Democrats Grant 5 Delegates More Power*, N.Y. TIMES, Dec. 10, 1992, at A12, col. 1 (Nat'l ed.).

[373] Delegate-elect Carlos Romero-Barcelo of Puerto Rico said "The fact that we get that vote does not necessarily mean we're another step closer to statehood. But it's another step toward more participation in the decision-making process. After all, we are 3.6 million U.S. citizens who are disenfranchised, who are ruled by laws passed by Congress." *Id.*

[374] Representative Newt Gingrich of Georgia, the House Republican Whip said, "The Democrats are creating five artificial votes . . . . It's the most extraordinary power grab in modern times. They are mugging us." *Id.*; *see also* George Will, *Democrat Power Grab Stinks*, HONOLULU ADVERTISER, Dec. 16, 1992, at A18, col. 3.

[375] Krauss, *supra* note 372.